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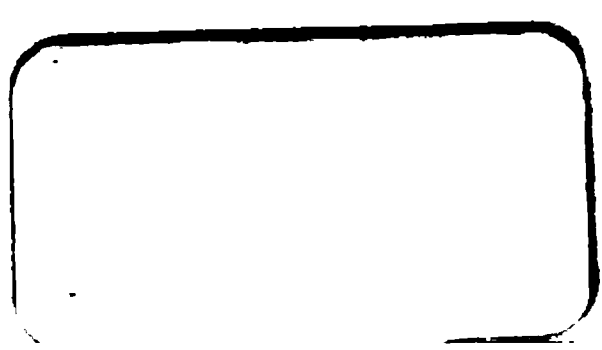
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A  
GENERAL ABRIDGMENT  
OF  
**Law and Equity,**

ALPHABETICALLY DIGESTED UNDER  
PROPER TITLES;

WITH NOTES AND REFERENCES  
TO THE WHOLE.

---

BY CHARLES VINER, Esq.  
FOUNDER OF THE VINERIAN LECTURE IN THE UNIVERSITY  
OF OXFORD.

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*FAVENTE DEO.*

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THE SECOND EDITION.

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M. DCC. XCI.



A

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## Actions. [Case. Gift.]

Fol. 105.

### (M. c) For what Act it lies. The Gift of the Action.

[1. **I**F a miller takes toll of one that ought to be toll-free, no action upon the case lies for this, but a *general action of trespass*; for it is altogether unlawful as if he had taken one half of the corn. \* 41 Edw. 3. 24. b. 44 E. 3. 20.]

Br. Action  
sur le Case,  
pl. 19. cites  
44 E. 3. 20.  
and pl. 14.  
cites 41 E. 3.

24. S. P.——But see Tit. Trespas (Y. 2) pl. [1] 10. and the notes there.  
\* Le. 109. pl. 147. S. P. cites 42 E. 3. 24. but it should be 41 E. 3. 24. b. [pl. 17] as in Roll.

[2. But if a lord of a manor prescribes to have his tenants to be toll-free in markets for buying and selling, if toll be taken in a market from one of the tenants, the lord may have trespass upon the case. \* 43 E. 3. 30. † adjudged. 7 H. 4. 2. b. per Roy (it seems as if the books are so to be intended, for it is *not* a trespass *vi & armis* as to him.) ]

Fitzh. Ac-  
tion sur le  
Case, pl. 32.  
S. C.——  
\* 7 H. 7.  
2. b. pl. 13.  
was trespass  
brought by  
the king a-

gainst the prior of N. and counted that he was lord of L. and that those of L. ought not to pay toll in any part of England, and that they of N. had taken toll of those in L. and the bailiffs of N. came and said, that they held of the king, and prayed aid of him, and it was granted, &c.——  
† Br. aid of the king, pl. 24. cites S. C. and Brooke says it seems it was for fee-farm, but that it is briefly reported.

[3. If a man takes upon him to cure a horse, if he performs the cure so negligently that the horse dies, an action upon the case lies against him, and not a general action of trespass. \* 43 E. 3. 33. † 48 E. 3. 6.]

\* Fitzh. Ac-  
tion sur le  
Case, pl. 33.  
cites S. C.  
† Br. Action  
sur le Case,  
pl. 24. cites S. C.

[4. So if a surgeon takes upon him to cure the hand of another that is wounded, and he does it *tam negligenter* that he is mayhem'd, an action upon the case lies against him. 48 E. 3. 6. \* 11 Hen. 6. 18. by contrary medicines. But if he does his endeavour, the action does not lie. 48 E. 3. 6. b.]

But because  
he did not  
allege in his  
writ at what  
place the af-  
sumpt was,  
therefore

the writ was abated notwithstanding he alleged it in his count; quod nota. Br. Action sur le Case, pl. 24. cites S. C.

\* (P. b) pl. 9. 10. cites S. C. but not S. P.

Mo. 691. pl. 955. Hill 36 Eliz. B. R. Maynard v. Basset. S. C. adjudged for the plaintiff in action on the case upon trover, and affirmed in the exchequer chamber, and that the plaintiff need not declare of taking, &c. vi & armis in action on the case. — Cro. E. 819. pl. 14 S. C. — Noy. 32. S. C. — 5 Rep. 24. b. Sir Tho. Palmer's case. S. C.

[ 5. If I cut down certain wood, and a stranger takes it out of my possession, though I may have an action of trespass, yet I may also have an action upon the case at my election. Pasch. 43 Eliz. B. R. adjudged between Basset and Maynard.]

• Viz. trespass vi & armis. Br. Action sur le Case, pl. 123. cites S. C. —

[ 6. If a man comes upon my own land, and makes a nuisance to my water-course, as if he makes a lime-pit, &c. I cannot have an action upon the case against him for this, but an action of \* trespass. 13 H. 7. 26. b.]

All. 84. cites S. C. and says it is no law. — In trespass the plaintiff declared, quod cum he was seised of two closes, to which a common was contiguous, and that the defendant broke down 10 perches of hedge of the same close, & sic profiratas for such a time custodivit, per quod the cattle depasturing in the common came into the closes and eat the grass ad damnum, &c. it was moved in arrest of judgment, that it should have been vi & armis, because the trespass is laid to be done in the plaintiff's own soil; but adjudged, that the concluding it per quod, and the commencement quod cum shew it to be an action of the case; and the causa causans of the damages may be laid with or without vi & armis. Allen 84. Mich. 24 Car. B. R. Cooper v. St. John. — Sty. 130, 131. S. C. & S. P. as to the vi & armis and the quod cum.

[ 2 ]

Fitzh. Tit. Action sur le Case, pl. 31. cites S. C. per Wyche, that no action lies against him but a common writ of trespass.

[ 7. So if a miller takes more toll than he ought to have, no action lies against him, but a writ of trespass. 41 E. 3. 24. b.]

S. P. and so of goods carried away for default of good keeping. Br. Action sur le Case, pl. 34. cites 7 H. 4. 14. [and the case is at 7 H. 4. 14. b. pl. 18. and so Roll misprinted.]

[ 8. If a servant that drives his master's cart by his negligence suffers the beasts to perish, an action upon the case lies against him, and not an accompt. 7 Hen. 4. 15. b.]

Roll Rep. 391. pl. 11. S. C. adjudged for the plaintiff. — Mo. 854. pl. 1168. Babington v. Lambert, S. C. adjudged for the plaintiff. — (N) pl. 2. S. C.

[ 9. If a man delivers money to my use, I may have an action upon the case against the bailiff. My Reports, Jac. Beckingham and Lamb v. Vaughan.]

Cro. J. 265. pl. 30. Lewson v. Kirk, S. C. The barons at first conceived the case did not lie but trespass vi & armis, because this matter was a mere tort; but afterwards upon consideration, all, except Snig, conceived that the action well lay for the special loss, which the plaintiff had by this spale-feasance, though the defendant had been now taken as a stranger, and though it is alleged that he did it in his absence, the plaintiff being beyond sea, and judgment for the plaintiff. — Lane 65. S. C. and at last Snig agreed that judgment ought so to be given for the plaintiff, and so it was.

[ 10. If a merchant's servant takes his master's goods that are arrived at a port of England, and before payment of the custom lands them, per quod the goods are forfeited and seised by the king, though the master may have an action of trespass against the servant, yet he may have an action upon the case against him. Trin. 8 Jac. Scaccario, between Leveson and Kirk adjudged.]

(Q. b) pl. 9. S. C. — Br. Action sur le Case, pl. 123. cites S. C. —

[ 11. If in a real action I lose by default after the summoners, jurors, and perners are dead, per quod I cannot have a writ of disceit, I may have

have an action upon the *case* against the *sheriff* if I was not summoned. 1 H. 6. 1. b.] le Case, pl. 73. cites S. C. per

June ch. baron, before all the justices of England in the exchequer chamber.—Fitzh. Action sur le Case, pl. 1. cites S. C.

[ 12. If a man that ought to enclose against my land does not enclose, per quod the cattle of his tenants enter into my land, and do damage to me, I may have an action upon the *case* against him, without bringing any *curia claudenda*. 11 R. 2. Action sur le Case 36. adjudged.]

[ 13. If a man that is bound by his tenure to repair a certain causeway by prescription does not repair it, per quod my land is surrounded, I may have an action upon the *case* against him. 29 E. 3. 32. b.]

[ 14. If a man enters upon the possession of the king's farmer, and takes the profits, per quod the farmer cannot pay the king, an action upon the *case* lies against him for the profits. 11 H. 4. 65.] Fitzh. Action sur le Case, pl. 29. cites S. C.—Br. Action

† sur le Case, pl. 43. cites S. C. but seems not to be very clearly abridged.

[ 15. But if a man enters upon the king's grantee of the land of a ward, where there is not any rent reserved, and takes the profits, the grantee shall not have an action upon the *case* against him, but an *ejectment de gard*. 11 H. 4. 65.]

[ 3 ]

Fitzh. Action sur le Case, pl. 29. cites S. C.

cites S. C.—Br. Action sur le Case, pl. 43. cites S. C.

[ 16. Where the statute of 3 E. 4. enacts, That none shall import any foreign cards within the realm upon a certain pain, if the king reserving a rent gives license to one man to import cards, if another man imports cards, the king's licensee shall not have an action upon the *case* against him supposing that he cannot pay his rent to the king, but the remedy that the statute of 3 E. 4. gives, ought to be pursued. Co. 11. Monopolies 88. b.]

Noy. 173. &c. Darcy v. Alien S. C. argued and many cases cited. Et adjournatur.—Mo. 671. pl. 919. S. C.

but S. P. does not directly appear.

[ 17. But if the king reserving a rent grants that none shall use such a thing but the grantee (admitting this grant good) if another does use it, the grantee may have an action upon the *case* against him; supposing that by this he cannot pay the rent to the king. (It seems as if this might be collected out of Co. 11. Monopolies 85.) ]

See the plea above; and I do not observe this point either in Noy, or Mo.

[ 18. If the servant of A. buys cattle of B. to the use of A. for 20l. to be paid at a time after, and the servant by the command of A. pays B. the 20l. and after B. comes to A. and says, that his servant had not paid him, upon which A. pays him again, A. may have an action upon the *case* against B. upon this disceit. Mich. 4 Car. B. R. between dame Grace Cavendish and Middleton, adjudged, being moved in arrest of judgment that she ought to have account, and not this action; the which intratur Trin. 4 Car. Rot. 243.]

Cro. C. 141. pl. 18. S. C. adjudged accordingly.—Jo. 196. pl. 9. S. C. adjudged accordingly.

[ 19. If a copyholder hath common by prescription in the wastes of the lord, and the lord stores the waste with conies, every one of the

(N. b) pl. 9. —See tit. Commoner

(A) pl. 1.— the copyholders may bring an action upon the *case* against the lord, averring that by this his common is impaired. Mich. 11 Jac. B. R. pl. 350. between Clayton and Sir Jerom Horsey, per curiam admitted.]

Jac. B. R.

Claydon v. Horsey seems to be S. C. but S. P. does not appear.—Cro. J. 229. pl. 7. Mich. 7 Jac. B. R. Horsey v. Hagberton is about filling up coney-burrows in the waste, but S. P. as here does not appear, for which reason, and likewise the difference of the year, it seems not to be the S. C.

See pl. 8. 9.  
18.

## (M. c. 2) Cafe or Account.

1. **I** F I deliver money to a man to deliver over, and he does not, but converts the money to his own use, I may chuse to have action of account against him or action upon the *case*; but a stranger hath no other remedy but action of account. Per Frowike Ch. J. Kelw. 77. b. pl. 25. Mich. 21 H. 7. Anon.

Dal. 99. pl. 30. Tottenham v. Bodingfield S. C. and

2. The plaintiff was lessee of a parsonage, and the *tithes being set out*, the defendant carried them away without any manner of claim or interest, and in account brought against him, Manwood and Dyer held that the action would not lie; for it is a wrong, and such are always without privity; he may have an *electione firmæ*; but Harper seemed that account lay. Owen 83. Mich. 14 & 15 Eliz. Tottenham v. Bodington.

[ 4 ]

Owen seems

to be a translation of Dal.—3 Le. 24. pl. 50. S. C. accordingly, that account does not lie; but says nothing of ejectment; and otherwise is in totidem verbis with Dal. and Owen.

S. C. cited by North Ch. J. Freem. Rep. 230. pl. 237. as

3. *Case* will not lie against a bailiff or factor where allowances and deductions are to be made, unless the account be adjusted and stated. Cited per Cur. 2 Mod. 312. Trin. 30 Car. 2. B. R. in Sir Paul Neal's case.

resolved by all the judges accordingly.—S. P. But when an account is stated there is an end of the account, and then an Indeb. Ass. will lie, but not before; per tot. Cur. . But they inclined that if an account was stated and reduced to a sum certain, yet if there were further dealings between the parties, and that sum was to run on in account, then that was part of the account current, and an action of account would lie. Freem. Rep. 242. pl. 254. Hill. 1677. in case of Harrington v. Lee.

S. P. per Cur. accordingly; but when the account is once stated, then an action on the *case* lies, and not an action of account. Mod. 268, 269. Trin. 29 Car. 2. C. B. Farrington v. Lee.

4. *Case* upon a special promise to account, the plaintiff gave goods to such a value, and a sum of money to the defendant, being master of a ship then bound for India, who promised to bring him the value of them home in India goods; per Holt Ch. J. if A. takes goods from B. to account for them, if they come to account though A. gives no true account, yet if B. has agreed to it it is well. 12 Mod. 517. at nisi prius coram Holt, Pasch. 13 W. 3. Spurraway v. Rogers.

5. And if one receives goods of another, and expressly promises to be accountable for them, or to give an account of them, *case* will lie, if he will not account, on that promise; but upon a general bailment of goods, without a particular promise to account, there the sole remedy is by account. Per Holt Ch. J. 12 Mod. 517. Spurraway v. Rogers.

(M. c. 3)

**(M. c. 3) Case or Covenant.**

1. **O**F covenant by parol, action upon the case lies for the non-feasance. Br. Action sur le Case, pl. 31. cites 3 H. 4. 3. *As in dis-*  
*ceit the de-*  
*fendant for*  
*after encosse*  
*ment,* and he brings writ of disceit in the county of L. where the covenant is made; and per Thirn. he ought to have brought it in the county of H. where the disceit was. *Quere. Ibid.*

2. In trespass, if a man takes upon him to cause J. S. to release to me all his right in such land, or to make me a house, or a surgeon to cure a man, or to plow my land and does not, or takes upon him to do it well and sufficient, and does it ill or insufficient, action upon the case lies, and he shall not be put to action of covenant. Br. Action sur le Case, pl. 69. cites 14 H. 6. 18. per June Ch. J. and Paston J.

3. If a man bargains with another for 2 pipes of wine for 10 l. and to deliver them to the plaintiff at D. and does not, action upon the case lies. Br. Action sur le Case, pl. 56. cites 21 H. 6. 55.

4. So of non-feasance of all other bargains, as to cure a wound, make a house, shoe a horse, &c. which is not by specialty; for then covenant lies. Br. Action sur le Case, pl. 56. cites 21 H. 6. 55.

5. So of mis-feasance contrary to his promise, by the best opinion. Ibid. cites S. C.

6. In trespass, &c. the defendant pleaded an exchange of lands between him and the plaintiff, and that it was agreed between them, that the plaintiff should make the fences and always maintain them, and that the fences of such a close were in decay, by reason whereof, &c. And upon demurrer the justices held this an ill plea, because this agreement can be no bar to an action of trespass though it had been by deed; for then he would only be put to his action of covenant, but now his proper remedy is an action on the case upon the promise if he doth not perform it. But Popham e contra. And judgment for the plaintiff. Cro. Eliz. 709. pl. 30. Mich. 41 & 42 Eliz. Nowell v. Smith.

[ 5 ]

**(M. c. 4) Case, or Detinue.**

1. **I**F I deliver my goods to a man for safe keeping, and he takes the custody upon him, and my goods for default of his custody are lost or destroyed, I may have action of detinue, or upon the case at my pleasure, and shall charge him by these words, *super se assumpsit*. And if I bring my action of detinue, and he wages his law, I shall be barred in action upon the case, because I had liberty, and having chosen an action of detinue, this was at my peril, and I lost the advantage of the action upon the case; and this is adjudged per Frowike. Kelw. 77. b. 78. a. pl. 25. *Kelw. 160. a. pl. 2.*

2. The plaintiff had counted that he bought 20 quarters of malt, and hath not shewed that it was in sacks, so by the buying no pro-

## Actions [Case, Gift.]

perty was altered; for the plaintiff cannot take this malt out of the garner of the defendant by virtue of such buying of malt not certain, nor he cannot have action of detinue. But if it was *in sacks, or in other manner severed from the other malt*, there the buying alters the property, so that the vendee may take or have action of detinue, and by the same reason have action upon the case; but as the case is here, he is put to his action of debt for the malt; and the matter was perused at the bar, and after by all the bench, *Kelw, 77. b. pl. 25.*

See (M. c.)  
pl. 71.

### (M. c. 5) Case, or Disceit.

Br. Disceit,  
pl. 10. cites  
S. C.

1. **I**T was agreed, arguendo in præcipe quod reddat, that if the tenant casts protection, and does not go according to the form of the protection, action of disceit lies; but if he goes, and returns within the time, &c. there action upon the case lies, and not writ of disceit. Note the diversity, Br. Action sur le Case, pl. 18, cites 44 E. 3. 4.

2. In recovery by default, if the tenant was not warned, they shall not have writ of disceit against the sheriff to re-have the land, but action upon the case; for he does not lose the land there by the default. Br. Disceit, pl. 16. cites 8 H. 6. 1.

3. Disceit, inasmuch as the defendant was his attorney, and ought to have taken obligation of J. S. of 100 l. to the plaintiff, and he took it to himself, and it is said that he ought to confess that he took [it as for] his fee; and per Newton J. action upon the case lies, and not action of disceit. Br. Action sur le Case, pl. 117, cites 20 H. 6. 25.

where

[ 6 ]

4. It seems that where a man promises for a consideration to do an act, and does it not, action upon the case lies. But where a man does his promise falsely, then action of disceit lies. Br. Disceit, pl. 2. cites 20 H. 6. 34.

the defen-

dant had sold certain land to the plaintiff for 100 l. and ought to have infeoffed him within 14 days, he, after the bargain had, granted a rent-charge to a stranger, and after infeoffed the plaintiff of the land charged, where the land was discharged at the time of the bargain, action of disceit lies. Ibid.

—So if he infeoffs a stranger after this promise, and first ousts him, and infeoffs the plaintiff; but Brooke says it is not adjudged. Ibid.

5. Case, for that the plaintiff having 100 l. delivered to him to pay over to J. S. and the defendant came to him, and falso & fraudulently affirmed he was J. S. whereupon he delivered the 100 l. to him; whereas, in truth, he was not J. S. Adjudged that an action of disceit lay against him. Mo. 538. pl. 705. Pasch. 39 Eliz. B. R. *Thompson v. Gardiner.*

(M. c. 6)



**(M. c. 6) Case where, and where Trespass.**

1. **A** Man shall not have general trespass of *misusing a licence in fact*, as of riding a horse 20 miles, where he borrowed to ride but 10 miles; and *contra of licence in law*, as to enter a tavern, &c. in the one case action upon the case lies, and in the other trespass. Br. Action sur le Case, pl. 95. cites 12 E. 4. 8.

See (M. c)  
pl. 1. 2. 3.  
4. 5. 6. 7.  
10. 14.  
Br. Action  
sur le Case,  
pl. 101. cites  
21 E. 4. 76.  
S. P.

2. The plaintiff had a cellar, over which the defendant had a warehouse, in which he laid so great a burthen that the floor broke, and fell into the cellar, and spoiled three butts of wine. 8 Mod. 274. Arg. cites it as adjudged, that an action on the case, and not an action of trespass, lay against the defendant. Edwards v. Hallender.

2 Le. 93. pl.  
116. Mich.  
36 Eliz. in  
the Exche-  
quer, S. C.  
—Cro. E.  
285. S. C.  
but I do not  
observe exactly S. P.

observe exactly S. P. — Poph. 46. S. C. but I do not observe exactly S. P.

3. One cannot have trespass for *breaking another man's fence*; but if he be *damnified by the breaking*, he may have action upon the case against the party that broke it; per Bacon J. Sty. 131. Mich. 24 Car.

4. Case, for *entering upon the possession of a term, which the plaintiff had recovered by verdict* given for him against the defendant. It was moved that the action should have been trespass, and not case. But per Roll Ch. J. A. may have an action on the case, or trespass, against B. at his election. Sty. 427. Mich. 1654. Jones v. Graves.

5. Action on the case, *Quare aquæductum suum fregit, &c.* lies well, unless it *appears that it was broken in the plaintiff's own soil*, and then trespass lies. Hardr. 61. Arg. cites Pasch. 12 Car. 2. B. R. Rot. 427. Forber v. Hayes.

Case, for  
that he was  
possessed of a  
farm, where  
of 2 closes  
were parcel,

and of a river running near those closes, and that the defendant did at S. in a certain meadow there, dig two fosses, by which the water into the ditches did run, so that pro diversis diebus he lost the benefit of it for his cattle. It was moved in arrest of judgment, that he ought to have brought trespass, and not an action upon the case; for the diverting the water is trespass; for inasmuch as the plaintiff intitles himself to the river, it is a trespass in its nature. Holt Ch. J. said the *diversion must be in the plaintiff's own land to make it a trespass*, and judgment for the defendant. Holt's Rep. 24. Mich. 8 Ann. Leveridge v. Hoskins. — 11 Mod. 257. pl. 12. S. C. — S. C. cited by Ld. Ch. J. Raymond. 2 Ld. Raym. Rep. 1402, 1403. accordingly.

6. Case doth not lie for *breaking a wall, in which the plaintiff had no property*, and which was *betwixt the plaintiff's house and an alley or street, and making a common passage through the wall*; for if it be the plaintiff's, trespass lieth; and if it be not, this action doth not lie; for his being disturbed in profit, guests, or of his rest, without particular damage, as that the plaintiff's house is undermined or worsted; per Windham J. to which the court agreed, and judgment for the defendant. Keb. 577. pl. 38. Mich. 15 Car. 2. B. R. Hill v. Kirkman.

**[ 7 ]**

7. Case for a *nusance for making a lime-kiln, without laying it to be upon the defendant's own soil*, was held bad; because if it were upon the soil of the plaintiff, trespass were the proper re-



medy, and not case, though a consequential damage, viz. the loss of a water-course, was laid. Arg. 12 Mod. 382. in case of Mikes v. Caly.

8. Case was against a servant for *taking away goods, for which toll was due*, without paying toll, whereby the goods were forfeited, and there it was questioned whether that were case or trespass; but held to be proper for case, because it was by a servant who had authority. Arg. 12 Mod. 382. in case of Mikes v. Caly.

9. Case was brought for *entering into waste, and driving cattle, whereby they were damaged*, and judgment was arrested; for that trespass lay, and not case. Arg. 12 Mod. 382. cites Pasch. 5 W. 3. entered Hill. 4. Rot. 105. Thornton v. Austine.

10. Case for *cutting the plaintiff's corn*, and judgment arrested; for it should have been general trespass, and if every trespass were turned to case, the king would lose his fines. Arg. 12 Mod. 382. cites Pasch. 9 W. 3. Gill v. Darle.

Id. Raym.  
Rep. 558.  
S. C. ad-  
judged for  
the plain-  
tiff.

11. Case, for that he was master of a ship laden with corn in such a port, ready to sail, &c. and that the defendant entered and seized the said ship, and detained her, *per quod* he was hindered in his voyage. Upon a demurrer it was objected that it should have been trespass, and not case; but adjudged for the plaintiff; for per Holt Ch. J. the plaintiff has no property in the ship, for that is the owner's, and he only declares as a particular officer, and can only recover for his particular loss; but he might have brought trespass, as a bailee of goods may; but then he must have declared upon his possession only. 1 Salk. 10. pl. 4. Pasch. 12 W. 3. B. R. Pitts v. Gainee.

12. In an action on the case, for *causing him to be arrested and carried to prison without a cause*, exception was taken, that this ought to have been trespass, and not case; that a man cannot change the nature of the action by laying it with a *per quod*. The true difference is this, *trespass is where there is an immediate injury; case, where the injury is collateral*. Powel J. said we must keep up the difference of actions, and it will be hard to maintain this; but if a man, by being imprisoned, should have a *special damage*, as *forfeiting a recognizance*, or that he *could not appear* at such a day, *per quod* he was *damnified*, &c. there it must be case; and Powis of the same opinion. Gould said, this is coupled with special matter, and laid to be done maliciously; ergo, case lay. But Pengelly said, you may as well say a man may maliciously assault and wound, and therefore case lies. Adjournatur. 11 Mod. 180. Trin. 7 Ann. B. R. Bourden v. Alloway.

A justice of  
peace has  
power by  
warrant to  
arrest a  
man, and if  
he does it  
wrongful-  
ly, case lies  
against him  
that malici-

ously causes this to be done. Arg. 11 Mod. 180.

13. Case, for *causing the plaintiff to be arrested* by a constable, and *falsely and maliciously charging her with a felony before a justice of peace*, and causing her to be committed to Bridewell, and put to hard labour. Per Holt Ch. J. It doth not set forth that he arrested her by his own authority, neither doth it appear to be a false imprisonment, and therefore it is not an action of trespass, but an action upon the case; and judgment accordingly. Holt's Rep. 22. pl. 20. Trin. 7 Annæ, . . . . v. Slater,

14. Where the complaint is not of a bare trespass, but for some special damages suffered by the arrest and imprisonment, which are not the consequences of every arrest and imprisonment, \* [or other such act] case lies. Arg. Holt's Rep. 22. in case of . . . v. Slater. \* As the stopping a water-course is trespass; but if it is set forth that the ground was spoiled, it is case. Arg. Holt's Rep. 22 Trin. 7 Ann.—And see (K. c) pl. 3.

15. A person that had a right to enter into the backside of his neighbour for certain purposes, entered thereinto, and fixed a spout to his house, by which the water from the said house was conveyed into his neighbour's backside, by which his said neighbour's buildings received great damage. Resolved per Cur. absente Powis, that trespass vi & armis would not lie, but it ought to be case. The distinction in law is, where the immediate act itself is injurious to the plaintiff's person, house, land, &c. and where the act itself is not an injury, but by a consequence from the act, that in the first case trespass lies, but not in the last; but in that the proper remedy is case. 2 Ld. Raym. Rep. 1399. 1402. Trin. 11 Geo. Reynolds v. Clarke. 8 Mod. 272. Trin. 10. Geo. S. C. adjudged accordingly; and says the civilians call trespasses on the case actiones injuriarum; and in the principal case an injury was done by

consequence of a lawful act, and therefore this action, being founded on a damage resulting from such act, is the proper action for the plaintiff in this case, and not an action of trespass. Holt's Rep. 22. S. P. Arg. in case of . . . v. Slater.

**(N. c) [Case.] For what Things it lies.**

[1. **I**F the beadle of an hundred ought, by virtue of his place, to have by prescription certain gallons of beer of every brewer at a certain price, if the brewers will not suffer him to have it accordingly, an action upon the case lies. 19 R. 2. Action sur le Case, 51. adjudged.]

[2. If a man ought to have toll upon the buying of cattle in a market, if one buys cattle, and does not pay the toll, an action upon the case lies for this. \* 7 H. 4. 44. b. 9 H. 6. 45. b.] \* Br. Action sur le Case, pl. 37. cites S. C. —Fitzh. Action sur le Case, pl. 26. cites S. C.—See (K. c) pl. 2.

[3. If those that are coming to my market are disturbed, or beat, per quod I lose my toll, an action upon the case lies. \* 11 H. 4. 47. b. † 9 H. 6. 46. ‡ 41 E. 3. 24. b. ¶ Fitz. Na. Bre. 124. c.] \* Fitzh. Action sur le Case, pl. 28. cites S. C. per Skrene.—Br. Action sur le Case, pl. 42. cites S. C. accordingly, because the plaintiff has interest certain in the thing; per Skrene.

So in case of forestalling a market, whereby toll is lost; per Powel J. 6 Mod. 49. Mich. 2 Ann. B. R. in case of Ashby v. White.

† S. C. cited by Wylde J. 2 Vent. 26. and allowed by Vaughan Ch. J. Ibid. 28.

‡ Br. Action sur le Case, pl. 14. cites S. C.—Fitzh. Action sur le Case, pl. 31. cites S. C. & S. P. by Bel.

¶ F. N. B. 124. (E) is not clearly S. P.

[4. So if upon a sale in a fair, a stranger disturbs the lord in taking the toll, an action upon the case lies for this. 9 H. 6. 45.]

[5. If

Br. Action  
sur le Cafe,  
pl. 74. cites  
S. C.—  
Fitzh. Ac-  
tion sur le  
Cafe, pl. 14. cites S. C.

[ 5. If a man *hath the assise of bread and beer, fines, amercements, and other matters of frankpledge by the king's grant, and he distrains for an amercement, and a stranger makes a rescue, an action upon the case lies against him.* 38 H. 6. 9. b.]

[ 9 ]

[ 6. If a man *disturbs my steward in holding my leet*, an action upon the case lies against him. \* 38 H. 6. 16. 19 R. 2. Action upon the Cafe, 52.]

\* Br. Ac-  
tion sur le

Cafe, pl. 75. cites S. C.—Fitzh. Action sur le Cafe, pl. 15. cites S. C.—F. N. B. 94. (G) in the new notes there (a) cites Trin. 16 E. 3. S. P.

[ 7. If a man, time out of mind, *hath had a leet*, and other court, &c. *within a manor and town*, and there hath not been any courts in the town, if a *stranger holds a court in the town, and distrains the tenants*, and them by many distresses does impoverish, *per quod they cannot pay their rents*, an action upon the case lies against him. 13 H. 4. 11.]

Fol. 107.

[ 8. If my *tenants* within a certain feignory ought, time out of mind, to go free to every market and fair, *to sell and buy goods without payment of toll*, and one takes toll of my tenants in his fair or market, an action upon the case lies against him. 43 E. 3. 30.]

[ 9. If a man *disturbs the servants and tenants of a lord in the collecting of his tithes due, &c.* an action upon the case lies against him. 19 R. 2. Action sur le Cafe, 52.]

Br. Action  
sur le Cafe,  
pl. 42. cites  
S. C.—

[ 10. Where there is *damnum absque injuria*, no action upon the case lies. 11 H. 4. 47.]

Fitzh. Action sur Cafe, pl. 28. cites S. C. per Hanke.—Injuria sine damno, or damnum sine injuria will not bear an action, but both must necessarily concur for that purpose; for things must not only be done amiss, but it must redound to the prejudice of him that will bring his action for it; per Gould J. Arg. 6 Mod. 46. but Holt Ch. J. ibid. 54. says, he thought it impossible there should be an injury without damage; for *injury* in its nature imports damage, though it costs not the party injured a farthing; for *damages* do not consist in things pecuniary, but in disturbance of right. If words are spoke of one whose reputation is so very undoubted that no body believes them, so that he loses nothing by them, yet because it is an injury to one to be ill spoken of, he shall recover damages; Or suppose one gives another a cuff on the ear, but does not hurt him, yet for the indignity offered his person action lies; So if another rides in a pathway in my land, I shall have action, because it is an invasion of my property, and an injury to my right.

\* Br. Ac-  
tion sur le  
Cafe, pl. 42.  
cites S. C.  
and a school  
and teach-  
ing of in-

[ 11. *As if a school be set up in the same town where an ancient school has been* time out of mind, by which the old school receives damage, yet no action upon the case lies, because it is lawful for a man to teach where he pleases, and this is for the ease of the people. \* 11 H. 4. 47. adjudged. † 22 H. 6. 14. b.]

fants is spiritual matter, per Thirn; quere inde.—S. C. cited Arg. Noy. 184.—S. C. cited Arg. 2 Brownl. 148.—The setting up another school is *damnum absque injuria*; per Twisden J. Mod. 69. Mich. 22 Car. 2. B. R. in pl. 19.—† F. N. B. 95. (A) in the new notes there (b) cites S. C. accordingly.

Fitzh. Ac-  
tion sur  
Cafe, pl. 28.  
cites S. C.  
but S. P. does  
not appear.

[ 12. [So] if I *retain a master in my house to instruct my children*, this is to the damage of the common master, yet no action lies. 11 H. 4. 47.]

[ 13. So

[ 13. *So if I have a mill, and my neighbour builds another mill upon his own ground, per quod the profit of my mill is diminished, yet no action lies against him; for every one may lawfully erect a mill upon his own ground. 11 H. 4. 47. \* 22 H. 6. 14. adjudged. 24 H. 8. Fitz. 46.]*

Case, pl. 11. cites S. C.—Noy. 184. Arg. cites S. C.—S. P. Br. Action sur le Case, pl. 42. cites 11 H. 4. 47. but contra if the miller disturbs the water to come to my mill, there I shall have action upon my case; per Hank. quod non negatur, and so was the use about 24 H. 8.—S. P. ibid. pl. 57. cites 22 H. 6. 14. and per Newton the plaintiff has no remedy but against them who ought to grind at his mill.

\* F. N. B. 95. (A) in the new notes there (b) cites S. C.—Fitzh. Action sur

[ 14. *So if a man bath a house upon his own ground by prescription, yet if I build a house upon my own ground next adjoining, no action lies against me. 22 H. 6. 14. b.]*

Case, pl. 11. cites S. C. but I do not observe S. P. there.

[ 10 ]

Fitzh. Action sur le

[ 15. *So if I have 100 acres of pasture in a town, and before this time no man bath ever had any pasture within the same town, and these of the town have used to agist their cattle in my pasture, and another, that has freehold within the town, converts his arable land into pasture, so that those of the town agist their cattle there, per quod this is a damage to me, yet I cannot have any remedy against him; for it is lawful for him to make the best advantage he can of his own land. 22 H. 6. 14. b.]*

S. P. per Newton. Br. Action sur le Case, pl. 57. cites 22 H. 6. 14. —Noy. 184. Arg. S. P. and seems to cite S. C.

[ 16. *If I have had a mill by prescription in my land, if another erects a new mill upon his own land, if this draws away the stream from my mill, or stops it, or makes too great a quantity of water to run to my mill, by which I receive damage, so that my mill cannot grind as much as it was used to do, I shall have an action upon the case against him. 22 H. 6. 14.]*

S. P. Br. Action sur le Case, pl. 57. cites S. C. but contra if I receive no damage by such means;

per Newton; but per Paston the action lies.—Fitzh. Action sur le Case, pl. 11. cites S. C. and S. P. by Markham.

[ 17. *If I have had a house by prescription upon my ground, another cannot erect an house upon his own ground next adjoining thereto so near to it that he stops the light of my house. \* 22 H. 6. 15. per Markham, Co, 9. Bland's case, 58. resolved.]*

See more of this at Tit. Stopping lights. —\* For if he does, I may

have assise of nuisance. Br. Action sur le Case, pl. 57. cites 22 H. 6. 14.—Fitzh. Action sur le Case, pl. 11. cites 22 H. 6. 14. S. P. by Markham. [but it is 15. a. pl. 23.]—S. C. cited 9 Rep. 58. a. in Aldred's case, and then cites Trin. 29 Eliz. B. R. Bland's case.—2 Le. 93. pl. 116. Arg. cites Bland v. Moseley, adjudged.

[ 18. *So he cannot build an house upon his own ground, so near my ground as to cause the rain to fall and drop upon my house. 22 H. 6. 15. per Markham.]*

Br. Action sur le Case, pl. 57. cites 22 H. 6. 14. —F. N. B.

184 (D) S. P.—S. C. cited Arg. 2 Le. 93. in pl. 116.

[ 19. *If I am a freeman, and another says I am his villain, and lies in wait to take and imprison me, & tantis insultibus & affraus efecit per quod circa negotia mea, &c. palam intendere, &c. an action upon the case lies against him. 2 E. 4. 5.]*

Br. Action sur le Case, pl. 90. cites S. C.—Fitzh. Action sur le

Case, pl. 16. cites S. C.—Kelw. 26. b. 27. a. Arg. S. P.—Ibid. 40. a. pl. 1. Mich. 17 H. 7. Anon.

Anon. it was clearly agreed by all the bar and the court, that if I threaten to seize one as my villein, this is no cause of action without more, viz. an act in fact, as lying in wait to take him, or the like, &c.

Br. Action [ 20. But if he does not *allege* that he *in tantis insultibus & aff-*  
sur le Case, *frailis effecit per quod circa negotia sua, &c. palam intendere, &c.* no  
pl. 90. cites S. C. action lies. 2 E. 4. 5. b.]

Fitzh. Ac-  
tion sur le Case, pl. 16. cites S. C.

[ 21. If a man *menaces my tenants at will of life and member, per*  
Fol. 108. *quod they depart* from their tenures, an action upon the case lies  
against him. 9 H. 7. 8.]

[ But the *threatning without their departure* is no cause of ac-  
Fitzh. Ac- tion. 9 H. 7. 8.]  
tion sur le Case, pl. 21. cites S. C.

& S. P. by Fairfax; for the departure is the cause of the action, which Keble agreed.

[ 11 ]

[ 22. If a *copyholder prescribes to have the toppings of trees grow-*  
Mo. 546. *ing upon his copyhold, and the lord cuts down the trees, and carries*  
pl. 727. *away the body of the trees, and leaves the toppings to the copy-*  
Stebbing *holder, yet the copyholder shall have an action upon the case against*  
v. Gosnell, *the lord; for he ought to have not only the present toppings, but*  
S. C. ad- *also those that shall grow hereafter. Mich. 3 Jac. B. R. cited per*  
judged for *Coke to have been so adjudged in B. R. between Stebling and*  
the plain- *Gosnold, which was adjudged. Mich. 40. 41 Eliz. B. R.]*  
tiff. —

Cro. E. 629. pl. 24. S. C. adjudged by Popham and Fenner, (absente Gawdy) but Clench doubted,  
because by this means the lord who had interest in the timber should never have any profit  
thereof, and so lose his inheritance, and therefore it is reason that he take his timber, and leave  
the loppings to the copyholder, otherwise they should never be cut down, and so the timber de-  
cay, to the prejudice of the commonwealth. — S. C. cited Roll. Rep. 196, in pl. 37. by Coke,  
Ch. J. but states it that the copyholder shrowded the trees first, and then the lord cut down the  
bodies, and adjudged that the action lay; for the Throwds are renewing annually; and Haughton  
and Geo. Crooke remembered the case — S. P. Arg. Brownl. 197. — 2 Brownl. 149. S.  
P. cited by Coke, Ch. J. as adjudged in one Whitehand's case.

[ 23. If the *lord in ancient demesne will not hold his court out of*  
*malice, &c.* the demandant in a writ of right there shall have an  
action upon the case against the lord; for otherwise by such means  
the lord at any time might make it frank-free. 11 E. 2. Action  
sur le Case 46.]

[ 24. But if the *custom of a copyhold manor be that a copyholder*  
Cro. J. 368. *for life may name his successor, and that the lord ought to admit him,*  
pl. 1. S. C. *and a copyholder for life, according to the custom names his suc-*  
the court *cessor, who after the death of the copyholder comes to the lord ac-*  
held the ac- *cording to the custom, and prays to admit him, and the lord refuses*  
tion lay not, *to admit him, yet no action upon the case lies for him against the*  
and judg- *lord, because this was but an estate at will at common law, and*  
ment for *though custom hath fixed the estate, yet that shall not enure to such*  
the de- *collateral purposes as this is, adjudged. My Reports, 12 Jac. be-*  
fendant. *tween Ford and Hoskins, 13 Jac. adjudged.]*  
— Roll.  
Rep. 125.  
pl. 7. S. C.  
adjournatur.  
— Roll.

Rep. 195. pl. 37. S. C. adjudged per tot. cur. against the plaintiff. — Mo. 842. pl. 1137.  
S. C. resolved that the action does not lie. — 2 Bulst. 336. S. C. adjudged accordingly.

Roll Rep.  
125. per

[ 25. So if a copyholder *surrenders to the use of one, and the lord*  
*refuses*



*refuses to admit him, no action upon the case lies against him. My Reports, 12 Jac.]* Coke, Ch. J. Arg. in pl. 7. S. P.

accordingly.—4 Rep. 28. b. 8. P. resolved Trin. 33 Eliz. pl. 17. in case of Westwick v. Wyer.—S. P. arg. Sid. 34. in pl. 2.—2 Vent. 27. S. P. by Tyrrel J.

[ 26. *So if such a copyholder, that is to be admitted, prays the lord to hold a court, and he will not, yet. no action upon the case lies against him. My Reports, 12 Jac.]* Roll Rep. 125. Hill. 12 Jac. B.R. per Coke Ch. J. quod

fuit concessum per Cur. in pl. 7.—2 Bulst. 336. S. P. accordingly by Haughton J.

[ 27. *If cesty que use at common law had requested his feoffees to make a feoffment to J. S. and they had refused, yet no action upon the case lay against him, but his remedy was in chancery only. My Reports, 12 Jac. per curiam.]* Roll Rep. 125. pl. 7. S. C. and S. P. by Coke Ch. J. quod fuit

concessum per Cur.—2 Bulst. 337. S. C. and S. P. by Coke Ch. J.—S. P. by Tyrrel J. 2 Vent. 27.

[ 28. *If it be the custom of a copyhold manor that surrenders shall be made to one of the tenants of the manor, if he will not take such surrender, yet no action upon the case lies against him. My Reports, 12 Jac.]* Roll Rep. [ 12 ]

7. S. C. and S. P. by Haughton J. quod fuit concessum per Coke Ch. J. Arg. 126. in pl.

[ 29. *But if a man brings a bargain and sale to an officer to be inrolled, according to the statute, and he will not inroll it within 6 months, an action upon the case lies against him. My Reports, 12 Jac. per Coke.]* Roll Rep. 126. S. C. and S. P. by Coke Ch. J. Arg. in pl. 7.

2 Bulst. 336. S. C. and S. P. by Coke Ch. J. Arg.—S. P. by Tyrrel J. 2 Vent. 27.

[ 30. *If feoffees to my use at the common law would not have joined in voucher where they might, per quod judgment passed against them, yet I could not have an action upon the case against them; but my remedy was in chancery only; contra 14 H. \* 4. 24. b.]* \* This should be 24 H. 8. 24. b. pl. 2. which says the remedy

was by subpoena, or by action on the case against the feoffee.

[ 31. *If an archdeacon will not induct a clerk, who is admitted and instituted, an action upon the case lies against him for that; because he had jus ad rem, and the church is full by institution. \* F. N. B. 46 H. † My Rep. 21 [12] Jac. per curiam.]* † Roll Rep. 125. pl. 7. S. C. and S. P. agreed per Cur. obiter.—

\* This should be F. N. B. 47 (H) where Fitzherbert says, he conceives the clerk shall have action on the case against the archdeacon because the induction is a temporal act; but that some have said he shall have citation in the spiritual court and punish him there; for perhaps he may allege a special cause, why by the spiritual law he ought not to be inducted, and which cannot be determined in the temporal court; Ideo Quære.—S. C. cited Cro. J. 369. at the end of pl. 1. —Action on the case well lies; per Doderidge J. Arg. 2 Bulst. 265. Mich. 12 Jac. cites 7 E. 4. 21. & 18 E. 4. 14. & 17. and yet he hath remedy in the spiritual court.—Ibid. 266. Coke J. agreed that case lies; for till induction the party cannot make a lease nor have any of the temporal profits of the land, which is a wrong, and therefore case lies.—S. P. agreed per Cur. Obiter Roll Rep. 64. Mich. 12 Jac. in pl. 9.—S. P. affirmed per tot. Cur. for good law, 12 Rep. 123. and says that with this agrees 26 H. 8. 3. and that though it is held 38 H. 6. 14. that he shall have remedy against the archdeacon to punish him [in the spiritual court] yet saving the opinion there, they cannot award him damages in such case, but he shall recover them at common law.—S. P. by Archer J. Arg. 2 Vent. 26.

[ 32. If

Cro. J. 478.  
pl. 12. Hunt

• Pol. 109.

v. Dowman  
S. C. and  
all the court  
held the ac-  
tion main-  
tainable,  
and judg-  
ment for

the plaintiff.—2 Roll Rep. 21. Hunt v. Dadvort S. C. adjudged accordingly.—2 Roll Rep. 312. S. P. cited by Chamberlaine J. to have been adjudged.

[ 32. If a man seised in fee makes a lease for years, and after comes to the land to see if any waste be there committed, and endeavours to enter upon the land \*, but a stranger disturbs him and will not let him enter to view the waste, the lessor may have an action upon the case against him; for the law allows him to enter and see whether any waste is committed, and for want thereof he may be prejudiced for want of knowing for what or when to bring his action; and so this is damnum & injuria. Pasch. 16 Jac. B. R. between Hunt and Todner adjudged, the novelty of this action being shewed in arrest of judgment.]

[ 33. Mich. 10 E. 3. B. R. Rot. 27. An action brought by the patron against the parson for suing in court christian for the advowson of the church, and tithes, against the statute, and damage recovered to 40l.]

[ 34. Hill. 9 E. 3. 6. Rot. 58. A man recovers 60 marks damage against the prior of Lewis for prosecuting an excommunication in the court christian upon a suit there for rent, and the prosecution was after a prohibition, and something was there raised afterwards.\* And there immediately after prædictus prior convictus est pro prosecutione de transgressionibus contra pacem regis in curia christianitatis, & similiter rasum est judicium.]

\* The sense of this does not seem very clear.

[ 13 ]

Mo. 355.  
481. Trin.  
36 Eliz.

YELDING  
v. FAY, ad-  
judged that  
the action  
lay.—

Cro. B.

569. pl. 4.

Trin. 39 Eliz. B. R. Yielding v. Fay, adjudged for the plaintiff.—S. P. but upon demurrer to the declaration these exceptions were taken, viz. That he did not shew whether the defendant was obliged to keep them by custom, prescription, or otherwise; neither hath he alleged any particular loss or damage by his cattle not increasing, nor that the defendant being rector of a church ought to find them in consideration of paying him tythes; and for those reasons the declaration was held ill. 4 Mod. 241. Mich. 5 W. & M. in B. R. Waples v. Basset.—Skinn. 399. pl. 33. S. C. and the court strongly inclined that it was not good.

Palm. 341.

Arg. cites  
S. P. ad-  
judged in  
C. B. 16

Jac. Stake-  
ly v. New-  
man.—

Palm. 381.

Arg. cites  
S. P. to

have been adjudged accordingly in a Cornish case; and Doderidge J. said he remembered this case and agreed to it.—Case lies for not carrying away the tithes-corn in convenient time. Nov. 31. in Dr. Bridgman's case.—S. P. per Cur. Hil. 1 Car. 1. B. R. Lat. 8. Arg.—

S. P.

[ 36. If a parishioner sets out his tithes of hay duly, and requires the parson to carry them off his land, but he does not carry them off in a convenient time, per quod his grafs where the hay lies is impaired by the hay's lying upon the grafs, an action upon the case lies against the parson. Mich. 13 Car. B. R. between Chase and Ware, per Cur. adjudged in a writ of error, and such judgment given in banco affirmed accordingly. Intratur Trin. 13 Car. B. R. Rot. 564. Mich. 15 Car. B. R. between Lee and Russel. per Curiam.]



S. P. and the court held that the plaintiff could not put in his cattle and eat the corn, for that would subvert the foundation of his action for the other part, which has been often adjudged maintainable, and it is unreasonable that the plaintiff himself should judge what is time convenient; and permitting him to put in his cattle and eat all the corn would be a much greater loss to the parson than what the plaintiff hath sustained by the corn's continuing on the land; but 'tis more reasonable to allow an action and so the court to judge of the reasonableness of the time, and that the recompence be proportionable to the loss sustained; and therefore judgment was given for the plaintiff. *Ld. Raym. Rep. 187. Pasch. 9 W. 3. C. B. Shapcott v. Mugford.* — *Ibid. 189. Arg. cites the S. P. to have been adjudged for the plaintiff, Mich. 22 Car. 2. B. R. Rot. 249. Lutcombe v. Porter.* — *Ld. Raym. 187. Shapcott v. Mugford.*

[ 37. But in the said last case when the tithes are set out, and notice thereof given to the parson, and he sends his servant to carry them away, and the parishioner then threatens the servant and will not suffer him to carry them away, and after the parson leaves them there a long time, to the damage of the grass of the parishioner, yet the parson is excused, if no new request was after made to the parson to carry them away. *Mich. 15 Car. B. R. between Lee and Ruffel*, adjudged a good plea in bar of the action of the parishioner against the parson, no new request being alleged, and this upon demurrer. *Intratur Trin. 15 Car. Rot. 691.* ]

[ 38. If a man makes a feoffment of certain lands by indenture, reserving a way over the land from such a place to such a place, though this way commenced by reservation and not by grant or prescription, yet if it be stopped he may have an action upon the case. *Trin. 11 Jac. B. R. between Chollocombe and Tucker*, adjudged. ]

2 Bull. 182. *Collicum v. Tucker.* S. C. adjudged for the plaintiff and held that the plaintiff

need not come to the defendant and shew him that he had occasion to make use of the way.

39. If an owner suffers beasts in agistment to continue beyond their time, action lies. *Palm. 341. Arg. cites 45 E. 3. 6.*

40. Action upon the case lies for a thing which lies in seafance, as for burning of goods or deeds, &c. *Br. Action sur le Case, pl. 111. cites 2 E. 6.*

41. The plaintiff sold certain trusses of hay to the defendant in such a meadow, to be carried away within such a time; but the defendant let it lie there till it putrified the meadow, so that the plaintiff lost the profit of the meadow for a long time, and thereupon brought action on the case against the defendant, and adjudged maintainable. *Fitzh. Action sur le Case, pl. 48. cites Hill. 13 H. 4.*

[ 14 ]

S. C. cited 2 Le. 93. in pl. 116. Arg. — S. C. cited *Palm. 381. Arg. — S. C.*

cited 2 Roll Rep. 328. Arg. — *Ibid. 329. S. C. cited by Doderidge J. — S. C. cited Godb. 329. in pl. 424. Arg. and Ibid. by Doderidge J. 331.*

42. If I have a way over your land, and you make a house a-thwart the way, I shall have assise of nuisance; but if a stranger makes it, or a trench, &c. action upon the case lies, *Br. Action sur le Case, pl. 57. cites 22 H. 6. 14. per Markham.*

43. If a smith refuses to shoe my horse, action on the case lies against him. Agreed by the whole court. *Keilw. 50. a. pl. 4. Pasch. 18 H. 7. Anon.*

F. N. B. 94 (D) in the new notes there (a) cites S. C.

and 21 H. 6. 55. — *Ld. Raym. Rep. 654. S. P. by Holt Ch. J. For if a man takes upon him a publick employment, he is bound to serve the publick as far as the employment extends, and for refusal an action lies.*

44. Action upon the case lies, *where no other remedy is provided, &c.* Br. Action sur le Case, pl. 64. cites 14 H. 8. 31. per Brooke J.

45. A feoffment was made to B. to the intent that he should convey the lands to C. and afterwards B. sold the lands to J. S. and refused to convey it to C. whereupon C. brought an action on the case. Wray Ch. J. and Gawdy held that the action lies; for a trust to convey the land to another is a good consideration in equity; but Schute J. held e contra. Godb. 64. pl. 77. Mich. 28 & 29 Eliz. B. R. Megot's case.

S. P. by  
Haughton  
J. quod fuit  
concessum,  
per Coke &  
Doderidge.

Arg. Roll Rep. 196.

46. If one has the nomination, and another the presentation to an advowson, and he that has the presentation will not present the party nominated, no action lies; per Cur. obiter. Mo. 842. Pasch. 13 Jac. in pl. 1137.

S. P. 2  
Bulst. 338.  
by Doderidge J.

Arg. —

S. P. 2 Vent. 27. per Tyrrel J. — Roll Rep. 196. in pl. 37. S. P. by Doderidge J. and agreed by Coke Ch. J.

47. If a feoffor seals a deed of feoffment, and afterwards refuses to make livery, no action lies; per Cur. obiter. Mo. 842. Pasch. 13 Jac. in pl. 1137.

S. P. 2  
Bulst. 338.  
by Haughton J. Arg.

— S. P.

by Tyrrel J. 2 Vent. 27.

48. If the tenant will not attorn to the grant of a reversion en pais, no action lies. Mo. 842. per Cur. obiter. Pasch. 13 Jac. pl. 1137.

49. A. was seised of a house newly built, and B. was seised of a house next adjoining, and B. in digging a cellar so near the house of A. that he undermined it, by reason whereof part of A.'s house fell into the hole so digged, action on the case lies for A. Adjudged. Roll Rep. 430. pl. 24. Mich. 14 Jac. B. R. Slingsby v. Barnard.

Palm. 341.  
381. Wiseman v.  
Denham,  
S. C. but no  
judgment.

— 2 Roll  
Rep. 328.  
S. C. ad-

journatur. — Godb. 329. pl. 424. S. C. adjournatur. But the reporter says, that he had heard it was afterwards adjudged for the plaintiff.

50. Case, for that there is a custom that every parishioner shall pay to the parson the 15th cheese, and that at the time he tendered them to the parson, who refused them, and let them remain in his house, without taking them away. Ley Ch. J. and Haughton held, that in this case the action well lies; but Doderidge e contra. Ley 68. 69. Trin. 20 Jac. Anon.

[ 15 ]

Palm. 381.  
Trin. 21  
Jac. B. R.  
S. C. Lea  
Ch. J. and  
Haughton  
held the  
action

maintainable, because the property was altered by the tender, and then the continuance in his house was

51. Case against the parson, for not carrying away his tythe-cheese, amounting to so many, and which he offered to him, but he let them bide half a year in the plaintiff's house against his will, to his damage, &c. The court seemed to agree that action lay; but on some doubt as to the place of tender, as it was pleaded, (viz. That it was at L. which was the parish, and not said to be at the house) and the action not being favoured by the court, the judgment was stayed. Palm. 341. Hill. 20 Jac. B. R. Wiseman v. Denham.

was a damage; but Doderidge seemed e contra. And as to the pleading, Lea thought the tender should be intended at the house; but Doderidge and Haughton e contra. No judgment was given.—2 Roll Rep. 328. S. C. adjournatur.—Godb. 329. pl. 424. S. C. and Lea and Haughton held the action lay; but Doderidge e contra. And as to the pleading and intendment, Ley held it good enough; but Doderidge and Haughton e contra. The Reporter adds, that he had heard that judgment was afterwards given for the plaintiff.—Ley's Rep. 69. 70. Anon. S. C. accordingly; but no judgment mentioned.—S. C. cited Noy 7. 31.

52. H. obtained a judgment in debt against A. as executor, and takes out a Fi. Fa. but before the sheriff could execute it, A. *secrete & fraudulenter sells, removes, and disposes of all the testator's goods, so that the sheriff is forced to return Nulla Bona, &c.* An action upon the case lies against A. For the sheriff could not return a Devastavit; for he could not tell what became of the goods, nor can the plaintiff have remedy by any other action, per Ley Ch. J. to which Doderidge agreed; but Haughton e contra, & adjournatur, Godb. 284. pl. 408. Pasch. 21 Jac. B. R. Yates v. Alexander. 2 Roll Rep. 292. S. C. accordingly.

53. If a man seised of land in fee *contracts to make a lease for years, and to deliver quiet possession, and a stranger disseises him*, he may have action on the case, shewing this special disturbance; per Ley Ch. J. 2 Roll Rep. 354. Trin. 21 Jac. B. R. per Ley Ch. J. obiter.

54. Case for *killing cattle infected with the murrain, and throwing the entrails into the plaintiff's field, per quod several beasts of the plaintiff's died*; adjudged for the plaintiff, and that this declaration was certain enough. All. 22. Mich. 23 Car. B. R. Lodge v. Weedem. Sty. 50. S. C. adjudged for the plaintiff Nisi, &c.

55. Whenever there is *malice and damage* a man may have action on the case. Arg. 11 Mod. cites \* 3 Keb. 753. and Vent. 348. Trin. 32 Car. 2. Anon. \* It seems that it should be 2 Keb.

753. Stowers v. Dennington.—But Holt Ch. J. said he was not satisfied with this case. 11 Mod. 74. Pasch. 5 Ann. B. R.

**(O. c) Spiritual.**

**Fol. 110.**

[1. IF A. and his predecessors have *used time out of mind to find a chaplain to sing divine service, and to perform the sacrament and sacramentals in the chapel of B. within the manor of D. for B. his servants and family, and he does not find a chaplain according to the custom, B. may have an action upon the case against him.* \* 22 H. 6. 46. b. Co. 5. Williams 73.] See (N. c) pl. 31. Fitzh. Action sur le Case, pl. 12. cites S. C.—Br. Jurisdiction, pl.

43. cites 22 H. 6. 52. S. P.—Br. Action sur le Case, pl. 61. cites S. C. and S. P. accordingly, and that the defendant being required had refused, *ad damnum, &c.* Markham said, this is rent-service, and the plaintiff may distrain; & non allocatur; and a good count, though the plaintiff did not shew seisin in himself, nor in his ancestors, and notwithstanding that the plaintiff did not say that he was there when the defendant refused; but because the plaintiff did not count what 4 days in Lent, nor what days after Lent the service should be done, the writ was abated, and the plaintiff brought other writ, and alleged all in certain. It was objected, that before the statute the plaintiff's ancestor enfeoffed the defendant's predecessor of such land to find a chaplain ut supra, by which the plaintiff may have cessavit, and not this writ; judgment of the writ; & non allocatur; because he did not traverse the prescription, and by this way he may find 2 chaplains; whereupon he traversed the prescription, and the others e contra. Br. Action sur le Case, pl. 61. cites 22 H. 6. 46.—5 Rep. 73. a. Mich. 34 & 35 Eliz. B. R. Williams v. Jones.—S. C. cited Arg. Litt. Rep. 95. the services being to be performed in his private chapel, and that with this accords Mich. 11 E. 4. Rot. 262. where Littleton, then a judge, brought

**[ 16 ]**

brought an action against the abbot of Hull in Yorkshire, for not finding a chaplain to celebrate divine service in a chape within his manor, and prescribed that he and all those whose estate he had in the manor, &c. and recovered against the abbot.

S. C. cited  
Cro. E. 664.  
in pl. 14.

[ 2. If the *vicar of B.* hath *used* time out of mind, either by himself or another chaplain, *to celebrate divine service* in the chapel of D. within the manor of S. which is within the parish of B. *every Sunday and Holy-day* throughout the year, before the noon of the same day, and to administer the sacrament *to the lord* of the said manor of S. *his men, tenants and servants within the precinct of the same manor inhabiting and commorant*, and the *vicar does not perform it*, yet the *lord* shall not have an action upon the case against him for this, but he *ought to sue him in the Spiritual court, to compel him to perform it*; for if the lord might have this action, then might every tenant of the manor have the same action, of which perhaps there are many, and so there should be an infinite number of actions for one default, for this is not a private chape as it is in 22 H. 6. Co. 5. Williams's Case 72, resolved.]

This belongs not to this head.

[ 3. If the *inhabitants* of a town have *by custom had a watering-place for their cattle*, if this be *stopped* by another, any inhabitant of the town may have an action upon the case against him that stops it, for otherwise he should be without remedy, in as much as such nuisance is not presentable in a leet or turn. Co. Litt. a case cited to have been adjudged so between Westbury and Powel for the inhabitants of Southwark, in B. R.]

S. C. cited  
Raym. 226.  
Arg.

4. If a man be *excommunicated*, and *offers to obey and perform the sentence*, and the *bishop refuses to accept it, and to assoile him*, he shall have a writ to the bishop, requiring him, upon the performance of the sentence, to assoile him, &c. and the reason thereof is, for that by the excommunication the party is disabled to sue any action, or to have any remedy for any wrong done unto him, so long as he shall remain excommunicate. And also the party grieved may have his action upon his case against the bishop, in like manner as he may when the bishop doth *excommunicate him for a matter which belongeth not to ecclesiastical conusance*. 2 Inst. 623.

5. For a *non-feasance* of a spiritual matter, no action on the case lies; but otherwise it is where the party receives a wrong; but be it for a *mis-feasance*, or a *non-feasance*, if *no damage* comes to the party by it, no action on the case lies for it; per Coke Ch. J. 2 Bulst. 266. Mich. 12 Jac. in the case of Pool v. Godfrey.

Reb. 947.  
pl. 9. Hill.  
17 & 18  
Car. 2. B.R.  
in case of  
Sir Andrew

6. An action on the case was brought for refusing to *admit A. to the sacrament*. Judgment was staid for a fault in the pleadings; but the court delivered no opinion as to the gift of the action. Sid. 34. pl. 2. Pasch. 13 Car. 2. C. B. Clovell v. Cardinall.

Henly v. Dr. Burstow, says the court agreed that an action on the case lay for refusing the sacrament, because by the statute of 1 Eliz. cap. the party is bound to receive on a penalty.

Raym. 23.  
S. C. adjudged for the defendant nisi, &c.—

7. Action on the case does not lie *for a legacy*, but the parties ought to sue for it in the spiritual court, and though such actions were lately [viz. in the time of Cromwell's rebellion] allowed, yet it was only propter necessitatem least there should be a failure of justice,

justice, there being then no spiritual courts; resolved per tot. Cur. **Feb. 116.**  
 Sid. 45. pl. 4. Mich. 13 Car. 2. B. R. Nicholson v. Shirman. **pl. 20. S. C.**  
 adjudged  
 for the defendant, nisi.

8. *Case by a parson for dilapidations* against his predecessor who had accepted another benefice, and left the houses out of repair, and set forth, that by the custom of the reahn he ought to pay to the successor *tantas denariorum summas as are sufficient ad reparand'*, and that the repairs amount to so much, &c. It was moved in arrest of judgment that this action does not lie, and of that opinion was Pollexfen Ch. J. who tried the cause, and was of the same opinion now, because it was *merely suable in the ecclesiastical court*, and though the case of DAY v. HOLLINGTON was cited as adjudged, Mich. 3 Jac. 2. C. B. for the plaintiff on a demurrer, yet the court now inclined to Pollexfen's opinion, but the case being in the paper to be argued again, and Pollexfen and Ventris dying in the mean time, and the case being argued again before Powell and Rooksby J. they gave judgment for the plaintiff. 3 Lev. 268. Pasch. 2 W. & M. in C. B. Jones v. Hill.

[ 17 ]

Carth. 224. Pasch. 4 W. & M. in C. B. S. C. and after long debate the plaintiff had judgment. — S. P. upon a resignation made by the predecessor, but it being moved in arrest of judgment, that the re-

signation was alleged too generally *quod resignasset*, without saying in *manus episcopi* as it ought to be, and without which it does not appear that the plaintiff is legal successor, and for that reason the declaration was held ill, notwithstanding it set forth that *postea the plainiff was presented, &c. et fuit legitimus & proximus successor*, &c. whereupon the plaintiff for a small matter compounded the matter with the defendant. Lutw. 115. Mich. 12 W. 3. Reynolds v. Hewett.

(P. c) In Nature of a \* Conspiracy. [And Pleadings.]  
 [And in what this Action differs from Conspiracy.]

\* If a writ of conspiracy be brought against 2, then it shall be properly called a writ of conspiracy; but if it be

[ 1. ] If in an issue between two a stranger gives false evidence against one, *per quod the verdict passes* against him, yet no conspiracy lies against him, because that which is given in evidence is not upon record. 39 E. 3. 13. adjudged.]

brought against one person only, then it is but an action on the case upon the falsity and deceit done, because one person cannot conspire with himself. F. N. B. 110. (L.)

In a writ of conspiracy it must be between 2, but in an action on the case it is otherwise. Arg. 2 Show. 50. said this difference has often been allowed in this court.

The difference between case and conspiracy is, that it is only properly an action of conspiracy where indictment is for treason or felony, and cites 2 Inst. 562. and therefore if such action be brought against 2, and 1 only is found guilty, no judgment can be given; for this is properly a conspiracy, it being to indict a man for a criminal matter; but where it is only to indict a man for a misdemeanor, though the action be against 2, and 1 only is found guilty, yet judgment shall be against him as in the case of trespass; for really it is an action on the case, and not an action of conspiracy; per Holt Ch. J. in delivering the opinion of the court. 5 Mod. 407, 408. Pasch. 9 W. 3. Roberts v. Savill. — All other cases of conspiracy mentioned in the old books were but actions on the case, and not properly writs of conspiracy; per Holt Ch. J. Carth. 417. S. C. — 12 Mod. 209. S. C. & S. P.

[ 2. If a man brings action upon the case in nature of a conspiracy, and that he maliciously procured him to be indicted of an offence, and prosecuted till fuit legitimo modo acquietatus, if the indictment was not good, the action does not lie, for he was not legitimo modo acquietatus; and this action is all one with a conspiracy as

If one be indicted of felony, and the judgment [indictment] is insufficient, to



but he takes not advantage of it, but pleads the general issue, and is acquitted, he shall never

to this. Hill. 8 Car. B. R. in Hunt and Line's case resolved per curiam.]

[ 18 ]

[ 3. As in an action upon the case, if the plaintiff declares that the defendant *falsely and maliciously procured him to be indicted for deceit, in the sale to him of one silk stocking*, (and the word *pair* is omitted between the word one and silk) after verdict for the plaintiff, adjudged that the action does not lie, because the indictment was not good, by reason of the omission of the word *Pair*. Hil. 8 Car. between Hunt and Line, per curiam adjudged.]

after have a

writ of conspiracy, &c. per Coke; Arg. Le. 279. in pl. 377. cites 9 E. 4. 12. by Littleton.

It has been often allowed in B. R. that in conspiracy it must be alleged, that the party was *legitimo acquietatus*, and shew that it was a fair acquittal; but case will lie for such a malicious prosecution where the jury find an *ignoramus*, &c. and judgment for the plaintiff. 2 Show. 50. pl. 37. Pasch. 31 Car. 2. B. R. Pollard v. Evans & al'.

In action on the case for maliciously procuring J. S. to be indicted for exercising the trade of a badger without licence, per quod he was put to great expence, (but the indictment was insufficient.) It was resolved, per Parker Ch. J. and the whole court, upon great consideration, that there was no reason for this diversity between a malicious prosecution on a good indictment, and on a bad one, and that this action lies as well for damage by expence, as by scandal or imprisonment, though the indictment be insufficient. 1 Salk. 15. Marg. cites 12 Annæ B. R. Jones v. Gwynn.—10 Mod. 148. 149. S. C. Hill. 11 Ann. B. R. the court were of opinion that such diversity was good; but ibid. 217. Hill. 12 Ann. Parker Ch. J. in delivering the opinion of the court, said that his opinion at first was, that where the indictment was neither scandalous nor sufficient, this action would not lie, but that upon further consideration he had changed his mind; for imprisonment, vexation and expence, are the same upon a groundless and insufficient indictment as upon a good one.

Fol. III.

[ 4. In an action upon the case in nature of a conspiracy against A. and B. his wife, for that they maliciously conspired to indict, and did indict him accordingly for the stealing of a ruff, Anglice a woman's ruff *de bonis & catalis de B. the wife*, and upon Not Guilty pleaded a verdict was found for the plaintiff, though a woman being a feme-covert can have no goods, yet after a verdict it shall be intended to have been as it might be, scilicet, that this was the goods of the wife *dum sola fuit*, and that the stealing was then, and not when she was covert. Hill. 9 Car. B. R. between Skinner and Parker, and Mary his wife, in camera scaccarii in a writ of error per curiam adjudged, and the first judgment affirmed accordingly. Trin. 8 Car. Rot.]

[ 5. If an action upon the case be brought against three, for that they conspiratione inter eos habita maliciously and falsely did accuse the plaintiff of a certain felony, and did procure him to be bound to the assizes, and did there prefer a bill of indictment against him, of which an *ignoramus* was found, and two of the defendants plead Not Guilty, and the third justifies, and they who pleaded Not Guilty are found Not Guilty, and the issue as to him who justified is found for the plaintiff, the plaintiff shall have judgment; for this action upon the case differs from a writ of conspiracy. Mich. 9 Car. B. R. between Palke and Dunning, adjudged per curiam, this being moved in arrest of judgment; but after judgment was staid per curiam, for another exception, and after the parties agreed, and so no judgment was entered. Intratur. Trin. 9 Car. Rot.]

[ 6. In an action upon the case, if the plaintiff declares that the defendant did procure him to be brought before J. S. a justice of peace, and there accused him for the stealing of a bull *de homine ignoto*;

*noto*; and after examination the justice, as much as in him lay, discharged him, and after the defendant procured him to be brought before J. D. another justice, and there accused him of the same felony, and maliciously procured him to be bound by the said justice to answer this at the next assises; at which assises he appeared, and the defendant *falso & malitiose ambiit & conatus fuit to indict him of the said felony*, the action does not lie upon this declaration, because all that is laid to be done, besides the last part of the endeavour, is *not laid* to have been done *falso & malitiose*, but only to be done ordinarily by legal process; and though the procurement of him to be bound to the next assises is laid to have been done maliciously, yet this is not laid to have been done falsely; and that which is laid in the end, that he *ambiit & conatus fuit falso & malitiose to indict him*, this is not any act done, but an *endeavour only*, for which no action lies. Pasch. 11 Car. B. R. between Palke and Dunning, per curiam, resolved after a verdict for the plaintiff, and after judgment for him, and this staid, and a superseas granted.]

[ 19 ]

[ 7. If A. and B. prefer a bill of *indictment of felony* against B. [D.] before the justices of gaol-delivery to the grand inquest, by conspiracy beforehand had, and in an action upon the case, in nature of a conspiracy, for this malicious prosecution, if the plaintiff does *not aver that he was then in the gaol, or that the said justices had power ad audiend' & terminand' felonias*, yet it seems the action lies; for though they had not power to take his indictment, yet this is a great slander and defamation. Mich. 9 Car. B. R. between Palke and Dunning, after a verdict for the plaintiff upon such a declaration, this matter being moved in arrest of judgment, and the Postea staid per curiam; and the court seemed to incline that the declaration was *not good*; but after the parties agreed, and so no judgment was given. Trin. 9 Car. Rot.]

[ 8. In an action upon the case, if the plaintiff declares that the defendant A. being a woman, to the intent to defame him, &c. and to hinder his marriage with any woman, *exhibited quendam famosum & scandalosum libellum in the consistory of Norwich* against the plaintiff, in which it was contained, *that the plaintiff did often in the night resort to her, under colour of being a suitor to her, and lay with her, and had a child by her, and after falso & malitiose published and affirmed all the said matter, per quod all honest persons, Deum præ oculis habentes, have refused, and yet do refuse to give any of their daughters or relations in marriage to him*; and upon Not Guilty pleaded, the jury found a special verdict, scilicet, that the defendant did prefer the said libel; and that after, at the general sessions of the peace, the defendant being examined in open sessions, who was the father of the said child, on her body out of wedlock begotten, she said and affirmed, that the plaintiff was the father of the said child, and the jury find that the defendant said the words of the plaintiff *falso & injuriose*, and that by reason thereof all honest persons, Deum præ oculis habentes, have refused, hucusque, to give in marriage to the plaintiff any of their daughters or relations. In this case this matter found is not sufficient to maintain the ac-

Fol. 112.  
See (D. 2)  
pl. 12. S. C.

tion; for the loss of his marriage is too generally laid, inasmuch as he does *not mention any communication of marriage with any woman, or loss of marriage with any particular woman*; and it is *not alleged or found that the libel was preferred falso & malitiose*, but only a legal proceeding in the spiritual court, for which no action lies; and the *finding of the jury that she said before the justices that he was the father of the child*, and that she said it *falso & injuriose*, will not maintain the action; because every prosecution, though without malice, if it be false is injurious, and yet no action lies, and this is none of the matter mentioned in the declaration. Mich. 10 Car. in camera scaccarii, between Norman and Symons, adjudged, and the judgment given in B. R. e contra reversed per curiam in a writ of error.]

S. C. cited by Holt Ch. J. in delivering the opinion of the court. 5 Mod. 409. Pasch. 10. W. 3.

[ 20 ]

[ 9. An action upon the case lies against *church-wardens*, for that they falsely and maliciously, to the intent to draw the plaintiff within the censures of the ecclesiastical court for adultery, *presented him there, upon a fame of his living in adultery with A. S.* Pasch. 16 Car. B. R. between Damont Ruddock and Sherman, adjudged per curiam, this being moved in arrest of judgment; and though the declaration was that they two conspired to do this, and *the one found guilty, and the other not guilty*, yet this being but an action upon the case, the action lies, and adjudged accordingly; and though it was *alleged that they made the presentment before the archdeacon of Sudbury, and did not aver that it was within the jurisdiction of the archdeacon*, yet the action lies; for though it is not within his jurisdiction, yet the vexation is the greater.]

Br. Conspiracy, pl. 25. cites S. C.—Br. Bill, pl. 17. cites

[ 10. A writ of conspiracy lies for him that is *indicted of a common trespass, and acquitted*, notwithstanding it was not of felony. 3 Ass. 13. adjudged.]

S. C.—S. P. Pasch. 3 E. 3. 19. a. pl. 34. For the party is as much damaged by imprisonment in case of trespass as of felony, though not in so great peril; and the law wills in every case where a man is damaged, that he have remedy without regard to the quantity of the damages.—Raym. 176. Arg. says that before the statute 33 E. 1. of conspirators, an action of conspiracy lay only for indictments of treason or felony; but by this statute it lies for trespass, and so against one only, and cites Trin. 11 H. 7. 25. [26. a] pl. 7. [Per Fairfax.]—S. P. Arg. Vent. 18.—S. C. cited Mod. 52.—Vent. 86. Trin. 22 Car. 2. B. R. Arg. says it has been lately held that no action will lie for an indictment of trespass, though false.

Case for *indicting him of a common trespass, of which he was acquitted*. The Ch. J. held the action will lie for the charges and expences in defending the prosecution, which the acquittal proves to be false, and the indicting him proves to be malicious; for if he had intended any thing for his own benefit or recompence, he might have brought a civil action; and then, if he had been found not guilty, he would have had his costs allowed. *Though the prosecution be for a trespass, for which there is a probable cause, yet after acquittal it shall be accounted malicious*; the difference only is where the indictment is for a criminal matter; but where it is for such a thing for which a civil action will lie, the party can have no reason to prosecute an indictment; it is only to put the defendant to charges, and to make him pay fees to the clerk of the assises. 2 Mod. 306. Pasch. 30 Car. 2. in C. B. Anon.—Ld. Raym. Rep. 381. S. P. cited by Holt Ch. J. as adjudged Hill. 34 & 35 Car. 2. B. R. in Shutter's case, and in the case of Dobbins v. Sir Richard Newdigate, at the end of the reign of king Charles II.

But if A. prefers a bill of indictment against B. for a common barre-

[ 11. If A. causes B. to be *indicted for a common barreter*, upon which indictment B. is *acquitted*, he may have an action upon the case against A. Mich. 10 Jac. B. R. between Messenger and Read, admitted.]

[ 12. So if a man maliciously causes another to be indicted for a common



common barretor *without colour, though he be not acquitted, yet an action lies.* Vide Mich. 10 Jac. B. R.]

tice of peace that the matter of the bill is true, and the jury find against B. and he brings case in nature of a conspiracy, pretending that by reason of A.'s oath the jury found the indictment against him, the action does not lie; per tot. cur. clearly, and judgment for the defendant. Bulst 185. Pasch. 10 Jac. Willins v. Fletcher.—And in the above case it was said, Arg. that in a like case it was adjudged lately, in case of Porter v. Griffith, in this court, that such action would not lie; for then no man would dare complain, if thereby he should be liable to an action; and if a juror or a witness come in upon his oath, case lies against him for this.

[ 13. So if a man procures another, falsely and maliciously, to be indicted upon the statute for a recusant, by which he should be made a traitor, &c. yet no action upon the case lies against him; for no \* conspiracy in such case lay against 2, for treason is secret in the mind, and where no conspiracy lies against 2, no action upon the case lies against one. Mich. 12 Jac. B. R. between † Lovet and Fawcner, per curiam, though this be treason by statute, and not by common law, the which intratur Mich. 11 Jac. Rot. 464. Mich. 20 Jac. B. R. between † Smith and Crawshaw, adjudged in arrest, where it was for treason in words; and the same case was after adjudged accordingly between the same parties in a new action, though it was there laid that it was done *falsa conspiratione prehabita.* ]

† In case in nature of conspiracy,

\*Fo. 113.

for procur- ing one to be indicted of treason, it was insisted that every man is bound to discover treason, and ought not to

Coke Ch. J.

conceal it for the least time, because it is against the state of the commonwealth. conceived that the action lies not; and the court said they would well advise whether such action lies, and stayed judgment quousque. And says no judgment was ever given. Cro. J. 357. pl. 16. Mich. 12 Jac. B. R. Lovet v. Falkner.—2 Bulst. 270. S. C. The court inclined to be all clear of opinion, that no action lies in this case; but for a fault in the declaration, and for that cause only, the judgment was Quod querens nil capiat per billam.—Roll Rep. 109. pl. 49. S. C. and Coke, Doderidge, and Haughton thought that no action lies, but no judgment appears.—S. C. cited 2 Roll Rep. 237. Arg. and says it was adjudged 12 Jac. that it does not lie, because it is dangerous to the commonwealth. But Ibid. 258. Arg. cites S. C. as shewn that judgment was never given, as appeared by the roll.—Ibid. 260. Doderidge J. said he thought the judgment was stayed for misrecital of the statute, on which the action was founded.

[ 21 ]

‡ 2 Roll Rep. 236, 237. S. C. held by Chamberlain J. that it did not lie; but Haughton J. contra.—Ibid. 258. S. C. The indictment was found Ignoramus. [See 260. by Doderidge.] The Ch. J. held that case does not lie in nature of conspiracy, for indicting another of high treason. Haughton J. held that if the malice be proved, and the party acquitted, conspiracy would lie. Doderidge J. took it, that when either case or conspiracy is brought for accusing another for traitorous words, he may by plea discharge himself, as to say that he heard the plaintiff speak such words, and he, as his duty was, revealed it, and the justices caused him to be indicted. But when he pleads the general issue, as in this case, then, if the party was indicted, and found not guilty, the suborner is punishable in this action; but here, it being found Ignoramus, is no acquittal by verdict, but is still subject to another indictment.—Palm. 315. S. C. states the bill found Ignoramus; and by 3 justices (absente Chamberlaine) the judgment was arrested.—Cro. C. 15. pl. 6. Mich. 1 Car. B. R. the S. C. Resolved after divers motions that the action lies; for it being alleged to be falsely and maliciously, and by conspiracy exhibited, and this being found by verdict, it ought to be punishable, otherwise none would be safe. All the judges delivered their opinions seriatim, and they gave judgment for the plaintiff.—Lat. 79. S. C. Pasch. 1 Car. adjudged that the action was maintainable.—2 Bulst. 271, 272. S. C. cited as adjudged Mich. 1 Car. B. R. by all the judges for the plaintiff.—Jo. 93. pl. 6. Hill. 1 Car. B. R. S. C. adjudged for the plaintiff.

\* See pl. 13, S. C.

[ 14. But Pasch. 1 Car. between the same parties, scilicet, \* Smith, plaintiff, and Crawshaw, Spurle, and Ward, defendants, per curiam, an action lies, where laid that they maliciously, and by conspiracy among them beforehand had, preferred a bill of indictment against him, for speaking treasonable words, and this found by verdict, and after this matter moved in arrest of judgment, the which is entered

Trim. 21 Jac. B. R. Rot. 651. and this was after, scilicet, Mich. 1 Car. at Reading term. Adjudged per totam curiam, that the action lies.]

15. A man recovered damages, and took execution by *elegit*, and E. by conspiracy caused the jury to extend the land too low, and caused them to find that the defendant had more land than he had in fact, so that the plaintiff, who recovered, had all the land of the defendant in execution, by name of the moiety; and yet because it is by verdict that it is so extended, therefore conspiracy upon the case does not lie against the offender who caused it; by award. Br. Action sur le Case, pl. 81. cites 27 Ass. 73.

Br. Conspiracy, pl. 8. cites S. C.

16. Conspiracy, in nature of action upon the case, was brought against three, who conspired to make the plaintiff make one of them his attorney, by which he should plead as they pleased, and so to cause the plaintiff to be found a villein to one of the defendants in another county, where the defendant had many friends, and the plaintiff was a stranger, and this was put in ure accordingly. The writ of conspiracy may be brought in the county where the conspiracy was. See Br. Conspiracy, pl. 6. cites 42 E. 3. 14. and Br. Action sur le Case, pl. 16. cites S. C. and Br. Lieu, &c. pl. 12. cites S. C.

17. A. complained to J. S. a justice of peace, that B. had stolen his hogs, whereupon he issued out his warrant, and A. was brought before him and examined, and bound over to sessions, where he appeared; but upon proclamation made, that if any one would inform against the plaintiff, &c. none came to give evidence against A. and so he was discharged. In action for this, brought by A. he had judgment. 3 Le. 101. pl. 146. Pasch. 26 Eliz. B. R. Fuller v. Cook.

Action upon the case, in nature of a conspiracy, lies not against any who prefer an indictment, and swears it to be true; for it is for the

18. The court took a difference where one, whose goods are stolen, comes to a justice of peace, and shews him the matter, and prays that the matter be examined, and that such a one is examined upon it; here in this case no action lieth. But if such a person in such case will expressly say, that such a one hath stolen, &c. and procures a warrant from a justice of peace, upon such surmise to arrest the party, upon such matter an action upon the case will lie. 3 Le. 101. pl. 146. Pasch. 26 Eliz. B. R. in case of Fuller v. Cook.

king and the commonwealth, and if it should be allowed, no indictment would be preferred. Cro. E. 724. pl. 57. Mich. 41 & 42 Eliz. B. R. Sherrington v. Ward.

[ 22 ]

7 Rep. i. 4. b. Bulwer's case, S. C.

For he having been imprisoned by it, is good cause of action.

19. Action lies for maliciously outlawing of a man, whereby he became very much damnified, though the proceeding were erroneous. 4 Le. 52. pl. 137. Mich. 26 Eliz. B. R. Bulwer v. Smith.

20. Case does not lie where a man pursues the ordinary course of justice, per Crooke J. Bulst. 151. in case of Wale v. Smith, cites 4 Rep. 146. [14. b.] Cutler v. Dixon.

21. An action upon the case lieth not for conspiracy where an indictment is preferred for felony by the party grieved, and he pursues it according to the law, and the statute of W. 2. which giveth damages

images where the party is acquitted, proves this, and this case remaineth at the common law. Per tot. cur. Cro. E. 70, pl. 25. Mich. 29 & 30 Eliz. B. R. Knight v. German.

22. A writ of conspiracy does not lie before he is acquitted of the indictment, or before it be traversed or otherwise avoided by error; for if it should, it might prevent the trial at law. Golds. 51. pl. 14. Pasch. 29 Eliz. Hurlstone v. Glastour.

Case for prosecuting the plaintiff upon a false and malicious indictment

went for battery, whereof he was legitimo modo acquietatus; upon the trial it appeared that the plaintiff was no otherwise acquitted than by a nolle prosequi, and this being made a point for the opinion of the court, it was held that this evidence did not support the declaration, because the nolle prosequi was only a discharge as to the indictment, but no acquittal of the crime. 1 Salk. 21. pl. 11. Mich. 3 Ann. Goddard v. Smith.—6 Mod. 261. S. C. the court all seemed clear that the action did not lie, but gave no rule.—11 Mod. 56. pl. 32. Pasch. 4 Ann. S. C. that the non-pros is only a discharge of the indictment.—3 Salk. 245. S. C. the court held that it ought to be an acquittal upon the merits of the cause, which was never tried in this case, and the not trying it was no default of the defendant; And per Holt Ch. J. this is no discharge, but is only putting the defendant sine die; for the attorney may take out new process if he will.

23. If one comes to a justice of peace, and complains that J. S. is a felon, and hath stole certain goods, and the justice commands the party, who complains, to be at the next sessions and prefer a bill of indictment against the felon, and give evidence against him, who doth accordingly; in this case neither he nor the justice shall be punished in conspiracy, although the felon so indicted be acquitted. Per Mountague Ch. J. Mo. 6. pl. 22. Pasch. 3 E. 6. Anon.

If a justice of peace causes one accused to him for an offence to be arrested by his warrant, although the accusation be

false, yet he is excusable; but if the party be never accused, but the justice of his malice and own head cause him to be arrested it is otherwise. Per Clench and Gawdy. Cro. E. 130. pl. 2. Pasch. 31 Eliz. B. R. in case of Windham v. Clere.—Le. 187. pl. 263. S. C. and S. P. by Gawdy and Clench.

In case for maliciously prosecuting an indictment against the plaintiff of which he was acquitted; it appeared upon the evidence that the defendant was a justice of peace, and procured some witnesses to appear against the plaintiff, and his own name was indorsed upon the indictment to give evidence. The court agreed that this does not make him a prosecutor; for if a justice of peace knows any that can give evidence against one indicted, he ought to cause him to do it. Vent. 47. Mich. 21 Car. 2. B. R. Gurlington v. Pitfield.—2 Keb. 573. pl. 85. S. C. says it was alleged that he refused bail, and that by hearsay he paid the fees of the prosecution; but the refusal of bail not being proved, nor any positive averment of his prosecution or payment of fees, the plaintiff was nonsuited; And per cur. strict proof of malice in this case of a justice is requisite, and procuring witnesses is no prosecution.

24. If one juror labours another unduely, an action lies because it is in nature of a conspiracy; cited by Doderidge J. Palm. 143. as 34 Eliz. Jerome v. Mason.

Case against a jurymen for maliciously indicting the plaintiff

of battery. Resolved that the action does not lie though it be said malitiose; and judgment against the plaintiff. Comb. 116. Trin. 1 W. & M. in B. R. Stowball v. Ansell.—Ibid. the court cited the case of lord MACCLESFIELD v. GROSVENOR in the exchequer in action of the case, where the defendant pleaded that he was a jurymen, and made his presentment as a jurymen on his oath, and though the declaration was malitiose yet the plea was held good.—3 Mod. 41. the earl of Macclesfield's case. Pasch. 36 Car. 2. B. R. the S. C. but S. P. does not appear.

25. Case in nature of conspiracy for a slander is only for damages, and lies well though the indictment is erroneous, or, as has been adjudged (as Yelverton J. said) if a bill be offered and Ignoramus found. Yelv. 46. Trin. 2 Jac. B. R.

[ 23 ]

When an indictment of treason

is preferred and Ignoramus found, the defendant may be guilty notwithstanding; so that action does not lie. Lat. 80. Arg. cites Mich. 11 Jac. Falkner's case [alias, Lovet v. Falkner.]

Yelv. 46.  
S. C. ad-  
judged ac-  
cordingly.

26. Action upon the case in nature of conspiracy, for that the defendant procured the plaintiff to be indicted for a common barrator, before J. S. and J. D. justices of the peace, nec non ad diversas felonias, &c. audiend' & terminand' and said that he was acquitted. But in the record they are mentioned as justices of peace only. Resolved by all the justices, contra Williams, that because the justices of peace have authority to inquire and hear it without any commission of oyer and terminer, there was no failure of the record, and the action did lie. Cro. J. 32. pl. 4. Trin. 2 Jac. B. R. Barnes v. Constantine.

Godb. 406.  
in pl. 486.  
the like dif-  
ference  
taken. Arg.

27. In case for conspiring to indict one for a felony, Crooke J. took this difference, where a felony was done revera, and where not; if it be a mere false allegation, and no felony done, yet if such a matter is laid to his charge, and he acquitted, there this action well lieth; but otherwise where in facto & in veritate, such a felony was done, and this laid to his charge, and he acquitted, he shall not for this prosecution have this action, because this is in advancement of justice, and for the finding out and due punishing of offenders. 2 Bulst. 331. Hill. 12 Jac. in case of Hercot v. Underhill.

28. A. indicted B. for a robbery of him, but the bill was found ignoramus. B. brought an action and sets forth all the matter, that A. falso & malitiose charged him with felony, &c. and falso & malitiose exhibited a bill of indictment, &c. whereby he was put to great charge for defence of his good name. The defendant justified, and found against him. And adjudged for the plaintiff. Upon error brought in the exchequer-chamber, it was assigned that this exhibiting a bill of indictment is no cause of action. But adjudged by all that the action lies; for though the exhibiting a bill upon true and just presumptions be excusable, and no action lies, yet when it is alleged that he falso & malitiose, without any such cause, had accused him of felony, and exhibited this bill falso & malitiose, it is great cause of slander and grievance, and just ground of action; the defendant having also made his justification, and all his causes of justification found false. Cro. J. 490. pl. 10. Trin. 16 Jac. B. R. Pains v. Porter.

29. An action upon the case will lie for maliciously bringing an action against one where he had no probable cause, and if such actions were used to be brought it would deter men from such malicious courses as are so often put in practice. Per Roll Ch. J. Styl. 379. Trin. 1653. in case of Atwood v. Monger.

And it is  
there cited  
to have  
been ad-  
judged ac-  
cordingly.  
Trin. 16.  
Car. B. R.  
in case of  
Damon v.  
Sherman.

30. Case for causing a false presentment to be made against the plaintiff before the conservators of the river Thames; after a verdict for the plaintiff it was moved that the conservators, &c. had no authority to take such presentment. Roll Ch. J. held it all one whether here was any jurisdiction or not; for the plaintiff is prejudiced by the vexation, and the conservators took upon them to have authority to take the presentment. Sty. 378. Trin. 1653. Atwood v. Monger.

An action upon the case lies for bringing an appeal against one in C. B. though it be coram non iudice by reason of the vexation of the party. Per Roll Ch. J. Sty. 279. Trin. 1653.—S. C. cited by Parker Ch. J. in delivering the opinion of the court. 10 Mod. 219. Hill. 12 Ann. B. R.

31. Goods were imported by merchants denizen, who paid the custom as such, and afterwards B. seized the goods as the goods of merchants alien, the custom being paid as for the goods of merchants denizen only, and then prosecuted an information in the exchequer, suggesting as above, whereby the goods were condemned as forfeited. Thereupon the merchants brought an action on the case against B. and it was found that B. falsely and maliciously exhibited the information. The question was whether the action lies, the goods being condemned as forfeited by the judgment of the court, which the party might have prevented by coming in before judgment upon proclamation, and claiming property, as Hale Ch. Baron said, and that if such action should be allowed the judgment would be blown off by a side-wind, that the mischiefs are great on both sides, and the case is of great concernment. The case was afterwards argued for the defendant and exceptions taken to the pleadings. And in Hill. term, 14 & 15 Car. 2. judgment was given for the defendant [but whether on the point of law or on the pleadings non constat.] Hard. 194, &c. 200. Trin. 13 Car. 2. Vanderbergh v. Blake.

32. If a man be prosecuted with all possible violence, and with apparent malice expressed in words or otherwise, yet if such prosecution were for a just cause, and the party be condemned, such action lies not; for the law takes no notice of malice where the cause of prosecution is not false. Arg. Hard. 196. in case of Vanderberg v. Blake.

If there be a probable cause innocence is not material, for it must be direct malice without

any colour of cause, per cur. 6 Mod. 25. Mich. 2 Annæ B. R. Anon.

33. Case, &c. for falsely and maliciously indicting the plaintiff for a rescous; it was moved in arrest of judgment that this action would not lie, because this indictment was only for a bare trespass; the court inclined that the action would not lie; but no judgment. Raym. 135. Trin. 17 Car. 2. Low v. Beardmore.

Sid. 261. pl. 11. S. C. and several agreed that no action lies for indicting one

of a trespass or rescous. For if it should it would be a great discouragement to prosecutors; but Twisden J. thought that if scienter & malitiose be in the declaration, and the intent to vex him, and all this proved upon the evidence as it ought, that then the action would lie; but judgment was stayed till moved again.—Lev. 169. S. C. and S. P. by Twisden, but it not being so laid, he and Windham only in court, held that the action did not lie, and stayed the judgment.

34. Case for maliciously indicting a justice of peace for delivering a vagrant out of custody without examination, contrary to law; adjudged an action will lie for that the indictment contains matter of imputation and slander as well as crime, and it is not like an indictment of forcible entry, &c. where the indictment contains crime without slander. Raym. 180. Pasch. 21 Car. 2. Sir Andrew Henly v. Dr. Burstal.

Vent. 23. S. C. the court inclined that an action lies; sed adjournatur. —Ibid. 25. S. C. adjudged for

the plaintiff.—2 Keb. 486. pl. 29. S. C. the court inclined against the action; sed adjournatur.—Ibid. 494. pl. 48. S. C. judgment for the plaintiff, nisi, &c.—S. C. cited by Holt Ch. J. Ld. Raym. Rep. 379. Mich. 10 W. 3. that the opinion of the judges in the case of Henly v. Burstal was that no action will lie for falsely and maliciously procuring one to be indicted of a trespass, and said he remembered they were of such opinion, and denied the case of 7 H. 4. 31. But he said that though he had great regard to what the judges then said, the court being then composed of very learned men, yet that opinion was not judicial, such matter not being then in question.



35. In case, &c. in the nature of a conspiracy, for *indicting the plaintiff for barrettry, one of the defendants only was found guilty*. It was moved in arrest of judgment, that one cannot be guilty of a conspiracy alone; but adjudged that this being an action on the case it is well enough. Raym. 180. Pasch. 21 Car. 2. B. R. Price v. Crofts.

Raym. 176.  
S. C. ad-  
judged per  
tot. cur.  
for the  
plaintiff.—  
Saund. 228.  
pl. 34. S. C.  
adjudged

[ 25 ]

for the  
plaintiff;  
for the sub-  
stance of  
the action  
was the un-

due arresting the plaintiff, and not the conspiracy; but Morton J. was of opinion that this was an action of conspiracy, and that two being acquitted, the plaintiff cannot have judgment against the third. The reporter adds a nota, that it seems to him that the plaintiff ought not to have judgment, because it seems to be a formed action of conspiracy by the words in the declaration, viz. *per conspirationem inter eos habitam*, and the verdict has falsified the declaration; for by the acquittal of all the defendants but one, it is found in effect that there was no conspiracy as the plaintiff has counted,

37. Case for falsely indicting the plaintiff *of perjury, in swearing in a suit between the father and J. S. tried before Wylde, that, &c.* Exception was taken, that it was *not shewed in what suit, whether in debt, or an action upon the case, &c.* sed non allocatur; for per curiam were the first indictment ill, though no conspiracy will lie, yet an action upon the case will lie, and judgment for the plaintiff. 3 Keb. 141. pl. 10. Pasch. 25. Car. 2. B. R. Smithson v. Simpson.

38. In action on the case for falsely and maliciously *indicting the plaintiff for a deceitful sale of hair*; it was moved in arrest, that this was only a mere trespass, and no matter indictable; sed non allocatur; for it is a matter criminal, slanderous, and fraudulent, and judgment for the plaintiff. 3 Keb. 837. pl. 75. Brigham v. Brocas.

39. Case lies for a malicious prosecution *of an information* in the clerk of the crown's name for ill words and a battery, of which the now plaintiff was acquitted by verdict. 2 Show. 295. pl. 292. Pasch. 35 Car. 2. B. R. Moor v. Shutter.

As a case for  
that the  
plaintiff be-  
ing church-  
warden, and

40. An action lies for a malicious prosecution, though the judges proceedings are erroneous. 2 Show. 145. pl. 121. Mich. 32 Car. 2. B. R.

*having given an account at the end of the year to his successor and the parishioners, the defendant falsely and maliciously cited him in the spiritual court to render an account, and that the judge, at the request of the defendant, excommunicated him for not giving an account.* It was moved in arrest of judgment,

that

that the court was to blame, and not the defendant, for the sentence was given by the court; but adjudged, that the action lies against the defendant. Raym. 418. Mich. 32 Car. 2. Grey v. Day. — 2 Jo. 122. GRAY V. DECGE S. C. says nothing of the excommunication, but adjudged for the plaintiff; for the malicious prosecution is a temporal injury, which ought to be recompensed in damages. — 2 Show. 144. pl. 121. GRAY V. DIGHT. S. C. adjudged for the plaintiff by the whole court on a solemn debate, though they did not shew the cause upon which he was prosecuted, but only to account generally; and to cite a churchwarden to account that has accounted before is actionable, though he goes no farther, and *though nothing ensued but an excommunication, and no copies nor any express damage laid*; for the court will consider of the consequences of an excommunication.

41. A. brought case against B. for falsely and maliciously procuring him to be *indicted for conspiring to lay a bastard child to B. of which indictment, upon trial, A. was acquitted*; after verdict for the plaintiff, upon Not Guilty pleaded, adjudged that the action well lay, for the conspiracy was a thing punishable at common law by fine and imprisonment, &c. Ld. Raym. Rep. 81. Pasch. 8 W. 3. Pedro v. Barret.

42. Case in nature of conspiracy for maliciously causing him to be indicted of a *riot* of which he was acquitted by verdict; upon a motion in arrest of judgment the court held that action lies for maliciously causing A. to be indicted whereby he is *damified* 1. *In his person*, as by imprisonment, 2. *In reputation*, as by scandal, 3. *In property*, as by expence. But in the last case the indictment must be found or ignoramus returned, though it needed not in the 2 first. But if the *indictment be found* by the grand jury, defendant shall not be obliged to shew a *probable cause*, but the plaintiff must *prove express malice* and rancour; and so it must be where the indictment contains scandal, or the party has been imprisoned, though *Ignoramus* be returned; for innocence is not sufficient; judgment affirmed. 1 Salk. 13. pl. 5. Mich. 10 W. 3. B. R. Savil v. Roberts.

Carth. 415.  
S. C. and judgment affirmed.  
— 5 Mod. 394. S. C. argued.—  
Ibid. 405. S. C. the resolution of the court, and

[ 26 ]

judgment affirmed—

12 Mod. 208. S. C. and judgment affirmed.—Ld. Raym. Rep. 374. S. C. and judgment affirmed.—S. C. cited by Parker Ch. J. 10 Mod. 217.

43. There is a great *difference* between bringing an action maliciously, and *prosecuting an indictment maliciously*; and that notion, that no action doth lie for *bringing an action maliciously* is not to be taken largely and universally, but *with some restrictions*; for if a man brings an action, he either claims a right, or complains of an injury; and the law always allows him to take his course of law to obtain his right, or to be satisfied for his injury; and this is allowed in all courts. 4 Co. 16. If a man says to another who is heir at law, and seised of lands, You are a bastard, these words are actionable; but if he says, You are a bastard, and I am heir to the estate, the addition of the latter words, though false, make them not actionable, because he claims a right. The law hath provided that no man should prosecute without finding pledges, and that was a security against troublesome actions; then if the plaintiff's suit be vexatious and groundless, he shall be amerced pro falso clamore, and though these amerciements be now matters of form, and therefore several acts of parliament have given costs to defendants, yet we must judge by the reason of the law, as it stood anciently; but in the case of an indictment there is no provision or remedy but by

by bringing an action; but if it appears the action is brought merely for vexation and oppression, the party grieved in some cases shall have action sur case; he shall not indeed say generally, that he falsely and maliciously, without probable cause, did bring an action, &c. but if he shews any special matter, whereby it appears to the court that it was frivolous and vexatious, he shall have an action, as in the case of *DAW v. SWAINE*. 1 Sid. 424. 1 Saund. 228. *SKINNER v. GUNTON*. Per Holt Ch. J. in delivering the opinion of the court. 12 Mod. 210, 211. Mich. 10 W. 3. B. R. *Savill v. Roberts*.

44. There is no arguing from actions on the *case* to actions of *conspiracy*. Actions of conspiracy are the worst sort of actions in the world to be argued from, for there is more contrariety and repugnancy of opinions in them than in any other species of actions whatsoever; per Parker Ch. J. in delivering the opinion of the court. 10. Mod. 218, 219. Hill. 12 Annæ B. R. in case of *Jones v. Gwynn*.

45. *Case* lies not unless the *indictment* be either *determined or deserted*; per Parker Ch. J. in delivering the judgment of the court. But *conspiracy* lies not without *acquittal*, and the only reason is, because it is a *formed action*, and the form of the *writ in the register* is so, whereas action on the *case* is tied down to no form at all, and lies on an indictment on which no acquittal can be; as where *Ignoramus* is found, or it was *coram non judice*, or the indictment was *insufficient*. 10 Mod. 219. per Parker in delivering the opinion of the court. Hill. 12 Annæ in case of *Jones v. Gwynn*.

46. Nor as to the bringing an action on the *case* is it necessary that the party should have been in *danger*; for it is not the danger, but it is the expence which is the ground of the damage; for when an indictment is returned *Ignoramus*, or is *coram non judice*, the party is in no danger at all; yet this action lies. Ibid. 220.

[ 27 ] (Q. c) [In Nature of a Conspiracy.] In what Cases it lies. Where no Felony is committed. [And what shall be good Cause of Suspicion.]

Roll Rep.  
438. pl. 4.  
Webb v.  
Wells. S.  
C. argued  
& adjorna-  
tur.—  
Bridgm.  
60. Weal v.  
Wells. S. C.  
—2 Bulst.

[ 1. ] IF a man hath good cause of suspicion that a felony is committed, and that J. S. is guilty thereof, and thereupon takes the ordinary course of law, and causes him to be indicted, though no felony was in truth committed, yet no action upon the case lies against him, because he did it in prosecution of justice; for otherwise every one will be deterred from prosecuting in such manner. My Reports, 14 Jac. B. R. Wells and Wells.]

284. S. C.—(R. c) pl. 2. S. C.

Cro. J. 193.  
pl. 19.  
Mich. 15  
Jac. S. C.  
by 3 jus.

[ 2. As if the daughter of J. S. complains to him that J. D. hath ravished her, upon which he complains to a justice of peace, and upon his binding him over indicts him, though no rape was committed, yet no action upon the case lies against him, inasmuch as he being the



the father had good cause of suspicion upon the complaint of his daughter. My Rep. 14 Jac. is cited, Hill. 14 Jac. B. R. Cox and Wirral, Rot. 886. adjudged.]

tices, contra Crooke; but if it had been alleged that

there had not been any ravishment, and that the defendant knew as much, it might peradventure be otherwise; but, as it is, it was adjudged for the defendant.—Yelv. 105. Mich. 5 Jac. S. C. adjudged accordingly.—Roll Rep. 439. Arg. cites S. C. Hill. 4 Jac. B. R. adjudged accordingly.—Bulst. 150. Arg. cites S. C. Hill. 5 Jac. B. R. ruled accordingly.—Ibid. 286. Arg. cites S. C. accordingly.

[ 3. If a man takes my goods, and sells them to a broker in London, and I supposing them to be stolen, and finding them in the possession of the broker, demand of him how he came by them, if he gives an uncertain answer, which gives me good cause of suspicion, for which I complain of him to a justice, and, upon his binding of him over, indict him, though the goods were not stole, and so no felony committed, yet no action lies against me. My Rep. 14 Jac. cites 44 Eliz. B. R. Chambers and Taylor, adjudged.]

Cro. E. 900. pl. 4. S. C. adjudged for the defendant, and they all resolved, that the allegation in the declaration

that the defendant falso & malitiose procured him to be indicted, is not traversable when the defendant alleges the special matter of procuring the indictment, which the plaintiff has confessed by the demurrer, which if false, the plaintiff might have traversed it.—S. C. cited as adjudged accordingly. Arg. Roll. Rep. 439. pl. 4.—3 Bulst. 286. Arg. cites S. C. accordingly.

[ 4. If a man casually loses 2 sheep, and after he finds J. S. driving 20 sheep by the highway, marked with 12 several marks, and upon this suspects him to have stole them, and that his 2 sheep were among them, and procures the constable of the town to arrest him, an action upon the case lies for J. S. against him, if he does not aver that his 2 sheep were stolen; for if no felony was committed, the arrest was not lawful, or at least a greater cause of suspicion that the 2 sheep were stolen than the casual losing of them. Mich. 10 Car. B. R. between Ley and Webb, adjudged.]

[ 5. If A. imposes the crime of felony upon B. where no felony is committed, and maliciously causes him to be arrested for it, \* an action upon the case lies upon such a declaration, without alleging any particular felony of which he was accused. Hill. 11 Jac. B. R. between Best and Aier, adjudged.]

\*Fol. 114.

6. A man may encourage another, who was robbed, to cause the felon to be indicted, and accompany him to the assizes in order to prosecute him, and no action on the case upon a conspiracy will lie against him; but otherwise if he knew that he was not robbed. Brownl. 9. Pasch. 12 Jac. Stone v. Bates.

[ 28 ]

7. A. had goods taken from him by B. which taking he supposeth to be felony, but it is not. A. complains to a justice of peace, who commits B. and binds A. to prosecute. Accordingly A. preferred a bill at the sessions, and B. is acquitted. The opinion of Hutton was, that action upon the case lies not against the prosecutor; for such action shall never be maintained without apparent malice in the prosecutor. Win. 73. Pasch. 22 Jac. C. B. Mankleton v. Allen.

8. Case, for causing him to be indicted of felony, as accessory in suffering a prisoner convicted to escape; After judgment for the plaintiff it was assigned for error, that the indictment was for a matter which was only trespass, and not felony; but the court answered, that

that though the matter with which the defendant is charged is not felony, yet there is a charge of felony in the indictment, and the plaintiff was scandalized by it, and therefore the action lies. Sty. 157. Mich. 1649. B. R. Gardiner v. Jolley.

(R. c) In what Cases it lies, *though a Felony was committed.* For Prosecution upon *Malice.*

See (Q. c)  
pl. 5.

If the indictment be fairly prosecuted, no action lies.

So if the court has a

jurisdiction, though the matter be scandalous, yet if there be no malice, no action lies; per Holt Ch. J. in delivering the opinion of the court. 12 Mod. 211. Savill v. Roberts.

Roll Rep.  
438. pl. 4.  
Webb v.  
Wells, S. C.  
& S. P.  
agreed per  
cur. but  
upon ex-  
ceptions  
taken to the  
pl. 1. S. C.

[ 1. **N**O action lies for procuring one to be indicted of felony without more, as *without averment that this was maliciously done, or without shewing that he was acquitted thereupon*; for it may be that he is guilty, and an indictment is the ordinary proceeding of the law. Mich. 5 Jac. B. R. between Nyn and Taylor, adjudged.]

[ 2. If my cattle are stole, and I find them in the hands of a butcher, and I knowing that he bought them lawfully in a market, and yet of malice I impose on him the crime of felony, and cause him to be arrested and indicted, upon which an Ignoramus is found, an action upon the case lies against me for my false and malicious prosecution. My Rep. 14 Jac. Wells and Wells, adjudged.]

pleadings, adjournatur.—3 Bulst. 284. S. C.—Bridgm. 60. S. C.—See (Q. c)

\* Cro. J.  
130. pl. 3.  
Markham  
v. Pescod,  
S. C. ad-  
judged and  
affirmed in  
error ac-  
cordingly.  
—Noy  
116. Pef-  
cod v. Mar-  
sam, S. C.

[ 3. If one man falso & malitiose procures another to be arrested and indicted for felony, though he was never acquitted thereof, yet this action lies; for a malicious prosecution, without an acquittal, is sufficient to maintain this action, though no writ of conspiracy lies without an acquittal. Mich. 4 Jac. B. R. between \* Markham and Pescod, adjudged. 29 Eliz. B. between Knight and Jerom, adjudged. Pasch. 11 Jac. B. R. between Horwood and Corders, adjudged, an Ignoramus being found.]

and the court held it good, without saying legitimo modo acquietatus

[ 29 ]

[ 4. If one falso & malitiose imposes the crime of felony upon another, upon which he is committed to gaol, and indicted; and after also falso & malitiose swears and gives evidence against him to the petit jury, that he stole a certain thing, and yet he is acquitted, an action upon the case lies against him for this malicious prosecution. Mich. 12 Jac. B. between Philips and Shale, per curiam.]

[ 5. If a man falso & malitiose prefers an indictment of felony against J. S. to the grand jury, and gives evidence thereupon to the grand jury upon oath, that the matter of the bill was true, and yet the jury find an Ignoramus, an action upon the case lies against him, shewing all this matter, how he gave evidence upon his oath, this being falsely and maliciously done. Mich. 9 Car. in a writ of error

in

in camera scaccarii, adjudged, and the first judgment given in B. R. affirmed, between Blackman and Trunket.]

[6. In an action upon the case, if the plaintiff declares that the defendant falsely and maliciously *charged him with the crime of suspicion of felony, for the felonious stealing of certain goods; and thereupon did procure him to be brought before a justice of peace, who did bind him over to the next assizes, where he did also falsely and maliciously prefer a bill of indictment against him to the grand jury, who found an ignoramus, and the defendant pleads to this declaration, and justifies that the plaintiff did steal the goods, and thereupon he prosecuted him, and preferred the bill as in the declaration; upon which the plaintiff replied De injuria sua propria sine tali causa, and this was found for the plaintiff, the action lies; for the crime of suspicion of felony is intended, according to common parlance, that he accused him of suspicion of felony, and he explains this by the words for the felonious taking of goods, and the \* defendant has justified this also; and if a man might accuse and prosecute others for suspicion of felony maliciously and falsely without punishment, any man might be scandalized; and the maintenance of such actions for malicious prosecutions, will not hinder any man from prosecuting without malice. Mich. 9 Car. B. R. between Palke and Dunning, per curiam, in 2 actions, in one of which the defendant pleaded Not Guilty, and was found guilty; and in the other he justified as before, but no judgment was given; but the parties agreed. Pasch. 10 Car. B. R. between Shapcott and Rowe. Intratur Trin. 9 Car. Rot. 1312. in which the defendant upon such a declaration justified, and such an issue de injuria sua propria, and this was moved in arrest of judgment, and judgment was given by all the court for the plaintiff.]*

**Fol. 115.**

[7. In an action upon the case, if the plaintiff declares that the defendant intending, *ex malitia sua propria*, to take away his good name and fame, *falso & invidiose* crimen felonie ei imposuit, (and it is not *malitiose*) but after it is alleged that he maliciously caused him to be indicted, and upon this to be tried; and then maliciously gave evidence against him to the grand jury, and an ignoramus was thereupon found, though it is that he invidiose crimen felonie ei imposuit, and not malitiose, yet all the declaration being laid together, it is well alleged that the prosecution was malicious. Mich. 14 Car. B. R. between Moore and Rock, this being moved in arrest of judgment. But Hill. 14 Car. adjudged a good declaration.]

8. Case, for that the defendant intending to detract from his name and fame, and to put his life in jeopardy, maliciously caused a bill of indictment of felony to be written before he came into court, which is not the office of a witness. Per Gawdy J. to which Wray agreed, if the defendant did it upon good presumptions, he ought to plead them, as that he found him in the house, or the like cause of suspicion; but no such thing is pleaded in this case, therefore conceived the action did lie, otherwise every one will be in danger of his life by such malicious practices. Cro. E. 134. pl. 12. Pasch. 31 Eliz. B. R. Knight v. Germin.

Le. 108. pl. 146. Jerom v. Knight, S. C. accordingly, and the judgment

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was affirmed in error. — But if

he had done it by command of the court, it had been otherwise. Admitted Arg. and cites 21 E. 3. 17. 10 H. 6. 5.—Cro. E. 134. accordingly in S. C.

Hutt. 49.  
Hord v.  
Corderoy,  
S. C. cited,  
and Hut-  
ton says he  
saw the re-  
cord, and that it is well and fully *averred* that he did not ravish the feme.—Jenk. 300. pl. 64. S. C. adjudged, and affirmed in error; for it is a slander of record. Jenkins says if there was a probable cause, an action does not lie, otherwise the ordinary course of justice would be obstructed.—S. C. cited Win. 28. Arg.

9. Case, for *indicting* the plaintiff for *ravishing the defendant's daughter*, and giving it in evidence to the grand jury, who found it *ignoramus*; notwithstanding which it was adjudged that the action lies. Win. 54. cites Hill. 10 Jac. B. R. and that it was affirmed in the exchequer-chamber. Whorewood v. Corderoy.

S. C. cited  
by the  
name of  
Deney v.  
Ridge, Win.  
54.

10. A bill of *indictment* was brought for *stealing of a horse*, but the *bill was not found*; and yet adjudged that an action on the case would lie for it. Arg. Win. 29. cites 14 Jac. B. R. Rot. 236. Demey v. Ridge.

## (S. c) Pleadings.

In case for  
indicting  
the plain-  
tiff for  
stealing  
sheep, with-  
out saying  
that he was acquitted, or that *ignoramus* was found, was held good by Twifden J. the jury having found it to be falso & malitiose; but that it seems otherwise upon demurrer. Sid. 15. pl. 7. Mich. 12 Car. 2. B. R. Wine v. Ware.

1. CASE, for causing the plaintiff to be *indicted for a robbery*, and doth *not shew that he was legitimo modo acquietatus*. Per Clench J. The plaintiff, both in conspiracy and in case, ought to shew that legitimo modo acquietatus fuit. Godb. 76. pl. 91. Mich. 28 & 29 Eliz. B. R. Shotbolt's Case.

Case for in-  
dicting the  
plaintiff at  
the general  
sessions of the  
peace coram  
A. & B. &  
sociis suis  
tunc justi-  
ciariis suis,  
&c. malitiose, &c. for breaking his house and stealing wheat. It was moved that it did not appear that the justices before whom, &c. were justices of Oyer and Terminer; but per cur. the declaration is good; for the laying it to be ad generalem sessionem must be intended to be before justices as had sufficient authority, especially as in this action their authority cannot come in question. Yelv. 116. Mich. 5 Jac. B. R. Arundel v. Tregono.

2. Case for that he procured the plaintiff to be *indicted before justices of the peace in the county of W. as a common barretor*, and that afterwards he *was acquitted before Anderson and Clench justices of assise there*. Per tot. cur. The declaration is not good; for he cannot be acquitted before them as justices of assise but as justices of Oyer and Terminer. Cro. E. 563. pl. 24. Pasch. 39 Eliz. C. B. Throgmorton's Case.

In case the plaintiff declared that defendant caused him to be *indicted* for stealing a mare, and that upon preferring the bill to the grand jury they found an *ignoramus*; and all the proceedings are expressed to be before the judges as commissioners for the gaol delivery, and not as commissioners of Oyer and Terminer. But per Roll Ch. J. we will intend it was before them as justices of Oyer and Terminer, but it is not material before what authority he was indicted; for the trouble the party is put to by this indictment is the cause of the action, and not his trial upon it; neither is it material whether the indictment be good or no, and the words are to be construed according to common intendment, viz. That he was indicted, though only an *ignoramus* was found, and so no indictment in law whereon he could be tried and brought in danger of his life. Sty. 372. 373. Trin. 1653. Anon.

—See Sty. 10. 11. Pasch. 23 Car. B. R. Anon. seems to be S. C. and the court said

[31] that the action might be as well grounded upon the scandal which grew to the party indicted as upon the trouble which might have befallen him by reason of preferring the bill against him.

Exception was taken that the declaration was that the defendant indicted the plaintiff before A. B. and C. and other persons justices of Oyer and Terminer, and that it does not appear that those justices were any of the judges of the one bench or the other as the statute 2 E. 3. cap. 2. ordains, viz. That in every commission of Oyer and Terminer there must be named some of the justices of the one bench or the other, or justice errant. But per cur. the words (other justices in the county)

county) shall be intended some of the justices of the bank, &c. and thereupon the plaintiff had judgment. Sid. 15. pl. 7. Mich. 12 Car. 2. B. R. Wine v. Ware.——The reporter adds a note, That the justices seemed that admitting the commission to be erroneous, the plaintiff might notwithstanding have his action, because it was the malice and the indicting him which was the ground thereof, but they said nothing thereof positively; Ideo Quere; for on the other side it seems that the party indicted might in such case have pleaded to the jurisdiction.

3. Conspiracy against 2, who pleaded Not guilty, *one was found guilty and the other not*; per tot. cur. adjudged that the writ should abate; for it ought to be against two, and one cannot conspire alone; but case in nature of a conspiracy would lie in such case. Cro. E. 701. pl. 18. Mich. 41 & 42 Eliz. B. R. Marsh v. Vaughan.

4. Plaintiff declared, that the defendant falsely and maliciously at A. charged him with felony, and there caused him to be brought before J. S. a justice of the peace, and procured him to bind the plaintiff to appear at the gaol delivery in the county of D. and there exhibited a bill of indictment, which was found *minime vera*. The defendant pleaded that he had divers sheep stolen, and missed others, which were found in the plaintiff's possession, going with 12 sheep which were stolen, whereupon he complained to the said J. S. who examined him, and finding him variant in his examination bound him to appear at the next gaol delivery, and the defendant to give evidence, whereupon at E. at the gaol delivery, he exhibited his bill, which is the same conspiracy. The plaintiff replied, *De son tort demesne*. It was found for the plaintiff, and adjudged for him; for he having laid it to be falsely and maliciously, and the jury having found it to be without such cause, it is therefore punishable. Cro. J. 190. pl. 16. Mich. 5 Jac. B. R. Doggate v. Lawry.

5. In action on the case for indicting the plaintiff malicious; it did not appear what was done upon the indictment, whether the plaintiff was acquitted or arraigned upon it or not, and therefore per tot. cur. judgment was entered against the plaintiff; for if nothing was done on the indictment the plaintiff would clear himself too soon, viz. before the fact tried, which would be inconvenient. Yelv. 116. 117. Mich. 5 Jac. Arundel v. Tregono.

In case for a malicious prosecution for arresting him for 100l. on purpose to hold him to special bail, where not

one penny was due. Defendant demurred specially because the declaration did not show what became of this malicious prosecution. It was admitted that this, objected after a verdict for the plaintiff, would not be good. Resolved that the declaration was naught; for as it now stands the first suit may either be determined, and that, by what appears, either for or against the plaintiff, or it may be deserted, or it may be still regularly going on, a verdict or a plea in bar admitting and confessing the first action false and hopeless might cure this defect; but the admitting this declaration good, as it is, would introduce inconsistent verdicts in different actions. Indeed if the first action goes off by nonsuit, it may be said that in another action for the same cause a verdict may be given inconsistent with the verdict in the present cause; though this may be, yet the possibility of such verdict in a future and not existing action, shall not hinder the bringing such action as this; per Parker Ch. J. in delivering the resolution of the court. And judgment for the defendant. 10 Mod. 145. Hill. 3 Ann. B. R. and 269. Hill. 12 Ann. B. R. Parker v. Langley.

6. Conspiracy, for that the defendant caused the plaintiff to be indicted for a felony, and in *prisona detineri quousque* before such justices *legitimo modo acquietatus fuit*. It was moved in arrest of judgment, because it is not said that he was (*inde*) acquietatus \* [*or de præmissis*] acquietat' and that it was so adjudged in case of

\* Yelv. 161. S. C. but there it is of an indictment of barretry, and ad-



judged for  
the plain-  
tiff; for the  
writ never  
has the  
word(inde,)

and the precedents are both ways.—Cro. C. 286. pl. 33. Mich. 8 Jac. B.R. Hitchman v. Porter, S. P. in action on the case in nature of conspiracy. Adjournatur.—Cro. C. 315. pl. 7. Trin. 9 Car. B. R. Porter v. Hutchman, S. C. & S. P. and cited the case of Bell v. Gamble, and also Pricket's case. Sed adjournatur.—Ibid. 419. pl. 9. Mich. 11 Car. B. R. the S. C. and resolved per tot. cur. in error of a judgment given for the plaintiff in C. B. that the judgment was good, and affirmed it accordingly.—Jo. 367. pl. 9. S. C. but S. P. does not appear.—S. P. agreed accordingly, Cro. J. 131. pl. 3. Mich. 4 Jac. B. R. in case of Marham v. Pescod, and cited to have been so adjudged 31 Eliz. B. R. in case of Knight v. Jerome; and Tanfield said he well knew this difference to be so agreed in that case. After long debate and advisement in that case, it was agreed per tot. cur. that (inde) ought to be in conspiracy.

Pricket v. Style; and the court at first were of the same opinion, but afterwards held it well enough; for it *cannot be intended of any other acquittal* than that whereof he was indicted. Cro. J. 230. pl. 8. Mich. 7 Jac. B. R. Bell v. Fox & Gramble.

7. Case for conspiring to indict the plaintiff for the supposed counterfeiting a letter, and maliciously prosecuting him for it at the assizes, where he was acquitted; the defendant made a special justification, that a stranger brought the letter to him, with which he cheated him of 30l. that there were three persons with the defendant when the letter was delivered to him, who said that the plaintiff was very like him, and that they believing him to be the person, he complained to a justice, who upon examination found cause of suspicion, and bound him over to the assizes, and there he was acquitted. By 3 justices this justification is not good, for the prosecution was upon *suspicion of other persons*, when it ought to be upon his own suspicion, and probable cause, but no judgment was given because the court was not full, and the parties were upon agreeing. Bulst. 149. Trin. 9 Jac. Wale v. Hill.

2 Bulst. 270.  
S. C. and for  
the same  
exceptions  
judgment  
was given  
per tot. cur.  
against the  
plaintiff.—  
Roll Rep.  
109. pl. 49.  
S. C. but the  
point of the

8. In case, for that *at the general gaol-delivery at W. before A. and B. justices of C. B. and of the peace, nec non ad diversas felonias audiend' & terminand' assignati*, the defendant falso, &c. caused the plaintiff to be indicted of treason, &c. But because the indictment did *not shew that A. and B. were justices ad gaolam deliberand' assignati*, the court held the declaration not good, notwithstanding it be shewn that they were justices of peace, and of oyer and terminer, and though they were in truth justices of assise, Cro. J. 357. pl. 16. Mich. 12 Jac. B. R. Lovet v. Fawkner.

pleadings does not appear there.—S. C. cited Palm. 315.—S. C. cited Lat. 80.

Bridgm. 60.  
S. C. says  
that Pasch.  
15 Jac.  
judgment  
was given  
against the  
plaintiff by  
the opinion  
of 3 jus-  
tices, be-  
cause all  
that was  
done after  
the warrant  
was legal;  
but they

9. In case, &c. for conspiring to *indict the plaintiff of felony for stealing 5 steers*, who was acquitted; the defendant *pleaded that he was possessed of 5 steers, which were stolen from him, and that upon fresh pursuit they were found in the possession of the plaintiff, and that the defendant demanding the sight of them, the plaintiff said, he had killed four, but refused to shew the skins, upon which he suspected him, and by warrant was brought before a justice of peace, and bound over to the sessions, and the defendant to prosecute him, and there he was indicted and acquitted; the plaintiff replied, and confessed that they were stole and brought to market at B. where he, being butcher, bought and tolled them, and afterwards was indicted for stealing them, and acquitted, absque hoc that he refused to shew the skins to the defendant.* The court seemed of opinion that this was a good

a good traverse, but would advise; but the same was never moved again, and said to be compromised. 3 Bulst. 284. Hill. 14 Jac. Weale v. Wells.

agreed that the plaintiff might have action for the charg-

ing him with felony, and for all that was done before the warrant. But Haughton J. disagreed, and conceived that judgment should be given for the plaintiff, because the plea of the defendant was no justification for what was done before the warrant; but at length judgment was given for the defendant.—Roll Rep. 438. pl. 4. S. C. adjournatur.

10. Case for that the defendant caused him to be *indicted* at, &c. for perjury, upon the statute of 5 Eliz. cap. 17. and that he was arraigned for the same, &c. on the 18th of September, in the year, &c. and that he was *debito modo acquietatus* on the said indictment remaining in the court, &c. And it was objected that the plaintiff ought to have alleged that he was *legitimo modo acquietatus*; but Mountague and Doderidge argued strongly that the action lies, and said that case differs much from conspiracy, and that the indictment is not the cause of the action, but the scandalous words which may occasion the loss of his reputation, and the damage received by him is cause sufficient, though the jury had found *ignoramus*, but that conspiracy is a strict action in which he ought to be *debito modo acquietatus* by verdict. And this was the opinion of the court at this time. Palm. 44. Mich. 17 Jac. B. R. Taylor's case.

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11. Case for maliciously preferring an *indictment* against the now plaintiff for felony, and inciting J. S. to give evidence that it was true, by which the plaintiff was bound to answer it the next assises, and there he was *acquitted*. It was argued that though it was not shewed in the declaration that the bill was found; yet Hobart Ch. J. held it was a great scandal to give this matter in evidence to a jury, for which the action lay. No judgment was then given; but the reporter says he heard the judgment was afterwards given for the plaintiff; but says *quære* better of that. Win. 28. 54. Mich. 20 Jac. C. B. Wright v. Black.

12. Action on the case in nature of a conspiracy is *not bound to any precise form as a writ of conspiracy is*, but is to be formed as the matter requires, and therefore lies, though one only does it; and though no acquittal, but an endeavour falso & malitiose to indict one by which he is grieved by imprisonment, or otherwise, though there was an *ignoramus* upon it; per cur. Jo. 94. Hill. 1 Car. B. R. in case of Smith v. Cranshaw.

13. Case for that the defendant *ex malitia* (but did not say falso) imposed felony on the plaintiff's wife, and before a justice of peace falso & malitiose charged her with felony. It was moved in arrest of judgment, that it was not said that he falso imposed upon her the crime of felony. Sed non allocatur; for having said that the defendant *ex malitia* imposed on her the crime of felony, that implies he did it falso. Cro. C. 271. pl. 6. Mich. 8 Car. Manning v. Fitzherbert.

14. Case in the nature of a conspiracy, for that the defendant falso & malitiose caused such an *indictment of perjury* to be written, containing hanc falsam materiam, &c. reciting it verbatim, and ex-

hibited it to the grand jury, and procured it to be found, *and that afterwards S. one of the justices of the peace of Middlesex, delivered it with his own hands to the justices of gaol-delivery, &c. whereby he was brought to the bar, and arraigned, and acquitted.* After judgment for the plaintiff in C. B. it was assigned for error, that the declaration was not good, because it is *only by way of recital of the indictment; sed non allocatur, for it is scribe fecit talem falsam materiam, which is a direct affirmative.* 2dly, Because he doth not shew that he was in the gaol, and then the justices of gaol-delivery cannot meddle with him; *sed non allocatur; for ducta ad barram sub custodia shews him to be in the gaol.* Cro. C. 553. pl. 8. Pasch. 15 Car. B. R. Bagnal v. Knight.

15. In case for preferring a bill of indictment of felony against him; it was moved in arrest that *falso was not in the declaration,* nor was it said that the indictment was delivered to the grand jury but to the court. But it being *said to be malitiose,* Roll Ch. J. said it cannot be malitiose unless it be also falso, besides *falso is expressed in the beginning of the record,* and it is not necessary to repeat it throughout the record; for the words subsequent are coupled to the precedent; and a bill of indictment is to be delivered to the court, and the grand jury receives it from thence. Sty. 374. Trin. 1653. Kitchenman's case.

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Sid. 95. pl.  
21. S. C. and  
S. P. —  
Keb. 389.  
pl. 99. S. C.  
and S. P.

16. In case for that the defendant *crimen felonix ei imposuit,* the defendant as to the imposition of felony, otherwise than by speaking of scandalous words, pleaded not guilty; and as to speaking the words that it was not *infra duos annos.* Per Twisden J. if the words are actionable at first then the damages after do not give cause of action, and the first plea is a full bar and the other fruitless. And of that opinion was the whole court, and so judgment for the defendant nisi, &c. Raym. 61. Mich. 14 Car. 2. B. R. Saunders v. Edwards.

17. In action upon the case, *quod falso & malitiose crimen felonix ei imposuit & quandam billam indictmenti scribi fecit continens hanc falsam materiam sequentem, viz. &c.* Wild excepted in arrest of judgment, in that the malitiose is not added to the latter part of the preferment of the indictment. *Sed non allocatur;* but *malitiose* being in the beginning, goeth to the whole sequel, although one part do not depend on the other, as here it doth. Judgment for the plaintiff, nisi. 1 Keb. 697. pl. 20. Pasch. 16 Car. 2. B. R. Atkins v. Down.

18. In case for falsely indicting, it was moved in arrest, 1st, That the plaintiff declares *quod juratores dixerunt quod ignorabant, (instead of ignoramus) &c.* The whole court (absente Wild) held this a good declaration; and it was agreed by the prothonotaries to be the common form either to say *Quod ignorabant,* or *fuerunt ignorantes.* 2dly, That the exhibiting this indictment is in course of justice, and it would be great discouragement to the execution of justice on malefactors, if action should lie upon every *Ignoramus* returned, and that falso & malitiose are words of form. Judgment was arrested. 2 Jo. 20. Cases in C. B. Paulin v. Shaw.

19. In



19. In case the plaintiff declared that the defendant *malitiose crimen felonice ei imposuit*, and did not mention any felony in particular; and yet held to be well enough. Vent. 264. Mich. 26 Car. 2. B. R. Anon.

Sid. 95. in pl. 21. at the end of the case, says it has been ad-

judged that such declaration is good; but that the plaintiff ought to prove the special matter. But the reporter says Quære, because it seems it would be mischievous; for that the defendant on such declaration could not know how to defend himself, since he is not particularly charged.

20. Case, for a false and malicious prosecution of a suit in an inferior court, and saith only *absque causa justa*; and held naught, because it might be with a probable cause, and if there were a probable cause for the suit, then it could not be malicious, and this action will not lie; *absque aliqua causa* will do, or *sine causa justa vel probabili*; but *absque causa justa* is not good for the reason aforesaid; and judgment for defendant. 2 Show. 154. pl. 139. Hill. 32 & 33 Car. 2. B. R. Box v. Taylor.

In the declaration against the defendant for malicious prosecution, it must be alleged to be without probable cause;

per Holt Ch. J. 6 Mod. 170. Pasch. 3 Annæ, B. R. Muriell v. Tracy & al'.

In the case of an indictment the laying it *falso & malitiose*, without *absque probabili causa*, is enough. But in action for a malicious prosecution, those words must be in. Resolved. 10 Mod. 148. Hill. 11 Ann. B. R. Jones v. Gwynn, cites Cro. J. 193. 490. 2 Mod. 51. Jo. 93. 94.

The words *absque rationabili & probabili causa*, are not always necessary to be used; and no authority has been cited to prove them necessary, though many have been cited, in which they are wanting; and the word *malitiose* implies it to be *absque rationabili & probabili causa*, and a great deal more; per Parker Ch. J. in delivering the judgment of the court. 10 Mod. 214. 215. Jones v. Gwynn.

21. Case, for that the defendant *tali die & loco falso & malitiose ei crimen felonice imposuit*. It was moved that it was too general and uncertain; and per cur. no other act is necessary to be alleged. But yet words importing a charge of felony will not be proof of it; there must be proof of some act. Judgment for the plaintiff. Show. 282. Mich. 3 W. & M. Haynes v. Rogers.

22. Case for malicious holding to special bail without cause. The sum for which he was arrested should be shewn. It was objected, that this matter could not be specially shewn, because the writ remains in the hands of the officer. It was answered, that the plaintiff might have moved the court that the sheriff might have returned the writ, and then all would appear; besides the warrant under the hand of the sheriff to the bailiff would be good evidence. 12 Mod. 273. Hill. 11 W. 3. Robins v. Robins.

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1 Salk. 15. pl. 6. S. C. and S. P. accordingly by Holt Ch. J. and that this action is a tender action, and accordingly

lies not till the original action is determined.—Ld. Raym. Rep. 503. S. C. and S. P. per cur. But judgment was ordered to stay, on account of the new manner of pleading, &c.

23. In action on the case for a malicious prosecution, the plaintiff must shew what became of the former action. 10 Mod. 145. Hill. 11 Ann. B. R. adjournatur. Ibid. 209. Hill. 12 Ann. B. R. S. C. adjudged for the defendant, Parker v. Langley.

The plaintiff brought an action upon the case against the defend-

dant, for maliciously prosecuting him in the sheriff of London's court, without any true or probable cause arising within the jurisdiction of the same court; but did not shew what was become of that action. The defendant demurred generally, and judgment was given for the defendant; and the court said that it had been resolved, upon great consideration in the case of PARKER V. LANGLEY, that it is necessary for the plaintiff, in an action for a malicious prosecution, to set forth what is become of that prosecution, and disallowed the entry in \* Lutw. 68, 69. MS. Rep. Mich. 4 Geo. B. R. Blackgrave v. Oden.

\* The case of Pritchard v. Papillion, Pasch. 36 Car. 2.

24 *But* a verdict, or a plea in bar, admitting and confessing the first action to be false and hopeless, may *cure this defect* in a declaration. 10 Mod. 210. per Parker Ch. J. in case of Parker v. Langley, cites Raym. 418. 2 Keb. 456. 753. 3 Keb. 781.—*So* if the first action goes off by *nonsuit*, though it may be said that in another action for the same cause, a verdict may be given inconsistent with the verdict given in the present case; yet the *possibility of such a verdict in a future, and not existing action*, shall not hinder bringing such action as this; per Parker Ch. J. 10 Mod. 210. in case of Parker v. Langley, cites Ashton, 40. Brownl. Rediv. 61. Robinson Ent. 91.

(T. c) Pleadings, &c. in Actions on the Case in general. Nonfeasance, Misfeasance, &c.

1. **T**RESPASS upon the case, that the defendant held 2 houses and 20 acres of land, &c. in B. by reason of which he and all ter-tenants thereof have used, time out of mind, to *repair and amend all rivers and banks*, and he has not done it, by which 30 acres of the plaintiff are surrounded, so that he lost the profits of it for 5 years, to the damage of 30l. and the writ was *contra pacem*, and therefore abated. Br. Action sur le Case, pl. 20. cites 45 E. 3. 17.

2. Trespass upon the case, inasmuch as the defendant holds certain land in R. by which he ought to cleanse and repair the ditches and banks, and did *not shew where* he ought to cleanse the ditches and banks, nor in what vill, and therefore the writ ill. Br. Action sur le Case, pl. 21. cites 46 E. 3. 8.

[ 36 ] 3. If the plaintiff recovers, [in trespass on the case for not repairing a wall, by which the land of the plaintiff is surrounded] the defendant shall be *distraigned to repair*; per Thirne. Quod non negatur. But Brooke says *mirum in this action*; but that it seems to be law in assise of nuisance. Br. Action sur le Case, pl. 32. cites 7 H. 4. 8.

4. Trespass, inasmuch as the defendant and those whose estate he has in 3 acres of land in B. *used to repair certain banks of the sea, and for not repairing, the sea has surrounded his land*; and the defendant demanded the view of the land, by which he shall be bound to repair; & non allocatur, by which the defendant said that he himself has nothing in this land, by which he shall be charged to repair, &c. unless in jure uxoris, who is not named; judgment of the writ, by which it was awarded that the plaintiff should take nothing by his writ. Quod nota. Br. Action sur le Case, pl. 36. cites 7 H. 4. 31.

5. In case of *laches of nonfeasance*, or non-repairing, &c. by which the land is surrounded, there the writ shall not be *vi & armis*. Br. Action sur le Case, pl. 46. cites 12 H. 4. 3.

6. Trespass upon the case was brought against the master of St. Mark in Bristol, that the said master, by reason of his tenure, *ought*

the bill was \* in *placito transgressionis*, and the declaration was in *placito transgressionis super casum*, but upon exception taken it was held good. Cro. C. 254. pl. 5. Pasch. 8 Car. B. R. Boulton v. Banks.

\* See Tit. Trespas (Y. 2) pl. [6] 15, and the notes there.

17. The record was *Queritur in placito transgressionis pro eo quod vi & armis cepit & chaseavit his cattle into the close of J. S.* It was moved in arrest, that the bill recites it to be *placitum transgressionis*, and the declaration is *vi & armis*, and therefore should have concluded *contra pacem*; but it was answered, that this is an action on the case, it not being brought merely for the taking or chasing of his cattle, but for an especial wrong, viz. for chasing into another's soil, so that they were trespassors there, and he forced to compound for the damage; And the *vi & armis* does not prove it to be an action of trespass; for they may be in an action on the case; and the recital of the bill being in *placito transgressionis* does not necessarily make it trespass only, but may serve for trespass on the case; and per tot. cur. adjudged for the plaintiff. Cro. C. 325. pl. 7. Mich. 9 Car. B. R. Tyffin v. Wingfield.

S. C. cited Hob. 180. pl. 215. at

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the end, and says, if the bill be general, neither saying *vi & armis*, nor *super casum*, specially, the plaintiff may use it to either.

18. In trespass on the case for false imprisonment, it was moved in arrest, that the declaration wanted *vi & armis*, this not being a mere action on the case, but is in its nature an action of trespass. Roll Ch. J. asked what they said to the case *Quare fregit suum mill-dam*, which had been adjudged good without *vi & armis* as well as with it. And said, that with *vi & armis* it is trespass, and without it it is an action on the case, and that it is a plain action on the case, for in the record it is with an *et quod cum*; and Bacon J. seems to agree. Sty. 130. Mich. 24 Car. Sir A. A. Cooper v. St. John.

19. In action on the case for indicting the plaintiff; if the indictment was found by the grand jury, the defendant shall not be obliged to shew a probable cause, but it shall lie on the plaintiff's side to prove an express rancour and malice; per cur. 1 Salk. 15. pl. 5. Mich. 10 W. 3. B. R. Savil v. Roberts.

### (U. c) Where several Matters may be joined in one Action.

1. *ASSISE* was brought of two several estovers in two places, and well. Br. Joinder in Action, pl. 49. cites 7 Aff. 18.

S. P. accordingly, and yet one

is at the common law, and the other by statute. Br. Plaint, pl. 29. cites 11 Aff. 13.

2. So of one and the same assise of land and cowsey. Br. Joinder in Action, pl. 49. cites 7 Aff. 18.

3. So of one and the same assise of two several rents; and one and the same plaintiff shall serve; quod nota. Br. Joinder in Action, pl. 49. cites 7 Aff. 18.

Br. Plaint, pl. 29. cites 11 Aff. 13.

S. P. of two

rent-services, and the like of two rents in gross.

Br. Joinder in Action, pl. 118. cites 14 E. 3. that a man may have one and the same assise of several rents, but that there shall be several plaintiffs, and not one and the same plaintiff of both.

4. A man

4. A man shall not have in one writ *Ejectment of ward and Quod blada sua apud B. nuper crescen' messuit, &c.* Et blada & alia bona, &c. cepit, &c. For proclamation lies in the one, and not in the other. Thel. Dig. 106. lib. 10. cap. 15. S. 1. cites Pasch. 11 E. 3. 471. Contra Trin. 29 E. 3. 48. in oyer and terminer, and 29 Aff. 35.

[ 39 ]

5. If land of gavel-kind descend to two sons, and they enter, and are disseised, the one dies without issue, and the disseisor dies seised, and his son enters and dies seised, and his heir enters; and the son, who survived, brings writ of entry sur disseisin against the heir of the son of the disseisor, he shall have several writs, the one of his own moiety, and the other of the moiety of which the right is descended to him by his brother; and otherwise the writ shall abate. Nota. Br. Joinder in Action, pl. 37. cites 24 E. 3. 13.

6. A man shall have one writ upon the statute of labourers against the master for the retainer, and against the servant for his departure out of his service. Thel. Dig. 106. lib. 10. cap. 15. S. 2. cites Hill. 29 E. 3. 7. and Mich. 28 E. 3. 97.

7. Where one is outlawed at the suit of divers persons in several actions, he ought to sue several *scire facias's*. Thel. Dig. 106. lib. 10. cap. 15. S. 4. cites Pasch. 29 E. 3. 43.

8. One *scire facias* lies upon the recognizance, for the good behaviour entered into by the principal and his surety; for though they are bound severally, yet it is but as one recognizance. 2 Roll Rep. 200. by Mountague Ch. J. Mich. 18 Jac. B. R. cites 29 E. 3. 33.

But ibid.

107. S. 20.

cites Hill.

19 H. 6. 54.

where

Newton

seemed to

doubt if such writ was good.

9. One writ of attachment upon a prohibition was maintained by several *pone per vadios's*, the one against the official for holding the plea, &c. and the other against the party, because he had sued contrary [to the prohibition] &c. Thel. Dig. 106. lib. 10. cap. 15. S. 5. cites Hill. 33 E. 3. Brief 912.

10. False imprisonment, for that he took him at S. in the county of E. and carried him to O. in the county of S. and there detained him till he had made fine of 10l. and the action was brought in the one county, but it did not appear in which. Chelr. said he ought to have two actions in this case; but the defendant was awarded to answer. Quod nota. Br. Lieu, pl. 23. cites 38 E. 3. 34.

11. Writ of trespass was *quare parcum suum fregit*, and afterwards *quare arbores suas succidit & asportavit*, &c. and adjudged good, notwithstanding the 2 *quare's*. Thel. Dig. 107. lib. 10. cap. 15. S. 23. cites Trin. 38 E. 3. 19.

Several trespasses at common law may be joined in one writ,

12. It was agreed that a man may have as many trespasses in one and the same writ as he will, and if vi & armis be at the commencement, it shall refer to all the matters ensuing. Br. Trespass, pl. 112. cites 38 E. 3. 15. 16.

but not where common law gives one, and statute law gives another. Jenk. 24. pl. 46.

As an action of trespass by a statute, and an action of detinue at common law, cannot be joined. 3 H. 6. 53. 11 Affise, pl. 13. But many trespasses at common law may be joined in one writ, and many detinues, waste, &c. Jenk. 211. pl. 46.

13. But

13. But it seems that *trespass vi & armis* and *trespass upon the case* shall not be joined in one and the same writ, for they are of diverse natures. Br. Trespas, pl. 112. cites 38 E. 3. 15. 16.

*Trespass vi & armis and master upon the case may be in*

one and the same writ. Br. Double Plea, pl. 108. cites F. N. B. in writ of trespass.

A general action of trespass and a special action on the case may be joined in one action; as trespass will lie for entering the house of the plaintiff and breaking his chests and carrying away his goods, and for beating his servant, per quod servitium amisit. Agreed. All. 9. Pasch. 23 Car. B. R. Vincent v. Furly. — Sty. 43. S. C. where S. P. was moved but not resolved.

Trespass vi & armis for entering his close and pulling down his booths (in a fair) and for hindering him to erect new booths, by reason whereof the plaintiff lost the profits of piccage and stallage. It was moved in arrest that the hindering the building new booths sounds wholly in case, and therefore is incompatible with the first part of the declaration which is vi & armis, the judgment in the first case being a capistur, but the last is only a misericordia. Sed non allocatur; for the hindering, &c. is laid only in consequence of the first trespass, &c. and of the same effect as a per quod in a declaration, which is often used in actions of trespass vi & armis, to let in the consequential damages, &c. and one plea goes to the whole; for if the defendant had pleaded a licence from the plaintiff to enter the close, that would have been a good justification of the trespass. And judgment for the plaintiff. Carth. 113. Pasch. 2 W. & M. in B. R. Drake v. Cooper. — S. C. cited Ld. Raym. Rep. 273. in case of Courtney v. Collet.

Trespass, for breaking his close, treading down the grass, and laying nets on the soil, and for carrying away of his fish; nec non so quod the defendant vi & armis did break down certain weares, whereby the water overflowed the piscary of the plaintiff adjoining, per quod the fish escaped out of the piscary, and the plaintiff and his servants were hindered from fishing there. Verdict pro quer. And moved in arrest of judgment, that here trespass and case were joined together, which could not be; but it was urged on the other side that it was all trespass, and that the per quod was only in aggravation of damages, and this term the court was of opinion that it was all trespass; and judgment was pro quer. 12 Mod. 164. Hill. 9 W. 3. Courtney v. Collet. — Carth. 436. S. C. adjudged accordingly. — Ld. Raym. Rep. 272. S. C. The court thought this a plain trespass; for the causing a superfluity of water to overflow the plaintiff's fishery is a plain trespass, and the per quod the fish escaped, is but in aggravation of damages. Sed adjournatur.

[ 40 ]

Actions can never be joined that have different judgments, as trespass and trespass on the case are two distinct things of different natures; and though if vi & armis is put in, in trespass on the case for male-feasance, it will not vitiate, yet the judgments in trespass and case are different; for in trespass the judgment always is quod capiatur; but in trespass on the case, though vi & armis be inserted, yet the judgment is quod sit in misericordia; per cur. Ld. Raym. Rep. 273. Mich. 9 W. 3. in case of Courtney v. Collet.

14. Action upon the statute of Marlebridge, that the defendant distrained in the high street, and detained them till plaintiff made fine, where the one of them is by the common law and the other by the statute, and yet good because the one is pursuant upon the other, Br. Joinder, pl. 42. cites 39 E. 3. 20.

Br. Issues Joines, pl. 66. cites S. C. — Br. Trespas, pl. 408. cites

S. C. — S. P. For a man may have several trespasses in one and the same writ. Br. Double Plea, pl. 144. cites S. C. — Thel. Dig. 106. lib. 10. cap. 15. S. 10. cites 39 E. 3. 25. that it is not double, notwithstanding the one is prohibited by the statute, and the other by the common law.

15. A man shall have one writ of debt where parcel of the debt is due by obligation, and parcel by contract. Thel. Dig. 106. lib. 10. cap. 15. S. 9. cites Pasch. 41 E. 3. Damages 75.

Heath's Max. cites S. C. and 1 H. 5. 4. accord.

ingly, because there debt is the only cause of action,

16. Scire facias to execute a fine levied of one manor and 2 parts of another manor to one for life, the reversion in tail to R. D. of one part, and of another part to A. for life, the reversion in fee to R. and the heir of R. brought scire facias to execute the tail. Judgment of the writ, because he demanded divers estates, therefore he ought to have several writs; & non allocatur, because it was by one and the same fine; quod nota. Br. Scire Facias, pl. 24. cites 43 E. 3. 11,

Theol. Dig. 106. lib. 10. cap. 15. S. 12. cites Pasch. 43 E. 3. 12. S. C. and S. P.



17. In writ of *audita querela* was comprised, that he had performed all the covenants of the defeasance, and also had released all actions, &c. yet the writ shall not abate; for he may hold himself to one. Thel. Dig. 106. lib. 10. cap. 15. S. 13. cites Mich. 44 E. 3. 36.

Heath's  
Max. 7.  
S. P. be-  
cause there  
one thing  
is the ground of the action.

18. But a man shall have *detinue of charters and of chattels* in one writ. Thel. Dig. 106. lib. 10. cap. 15. S. 6. cites Mich. 44 E. 3. 41. Brief 583.

Br. Joinder  
in Action,  
pl. 10. cites  
S. C.

19. *Detinue of a chest and a certain sum of money, and certain charters*, and shewed specially the contents of them, and what land they concerned, and both in one and the same writ, where the one demands process by *capias*, and of the chest and money, and of the charters, special lies only in distress, and not *capias* or exigent, and yet good. Br. Detinue de Biens, pl. 14. cites 44 E. 3. 41.

Br. Joinder  
in action,  
pl. 17. cites  
S. C. ac-  
cordingly.

20. A man shall not make title in one writ of the *seisin* or dying of two ancestors. Thel. Dig. 106. lib. 10. cap. 14. S. 11. cites Pasch. 48 E. 3. 14.

—Nor upon *disseisin done to two ancestors*. Thel. Dig. 106. lib. 10. cap. 14. S. 11. cites Pasch. 31 H. 6. 15.

[ 41 ]

If two coparceners are disseised, and the one has issue and dies, and the other dies without issue, the issue shall not have one and the same writ of entry of the whole against the disseisor but several writs. Br. Joinder in Action, pl. 101. cites 31 H. 6. 8.

Heath's  
Max. 7.  
cites S. C.  
and says,  
that in  
things of  
the like na-  
ture one de-  
claration

21. One writ upon the case was maintained for *disturbance to hold a leet*, for disturbing of his tenants and servants from collecting tithes, for menaces made that the people durst not come to the chapel of the plaintiff to pay their devotions and offerings, and for taking of his servants and chattels. Thel. Dig. 107. lib. 10. cap. 15. S. 15. cites Hill. 19 R. 2. Action sur le Case, 52.

may contain divers several torts as these are in the principal case.

Thel. Dig.  
107. lib.  
10. cap. 15.  
S. 16. S. P.  
cites Pasch.

22. A man may have *debt and detinue* in one and the same writ by several *præcipes*, for they are of one and the same nature. Br. Joinder in Action, pl. 97. cites 3 H. 4. 13.

5 E. 3. 181. and 11 H. 6. 60. and says, that by the new Nat. Brev. 152. it lies. [But I do not observe it there.] But *ibid.* S. 6. says the opinion of Hill. 33 E. 3. Brief 913. is, that a man shall not have one writ of *debt and detinue of chattel upon bailment*, &c. and cites 3 H. 4. 13. and 32 E. 3. Brief 288.—S. P. accordingly, L. P. R. 16. cites Rast. Ent. 150. pl. 13. 174. pl. 15.—5 Mod. 92. Trin. 7 W. 3. B. R. the court said it seemed strange that debt and detinue should be joined, because those actions have different judgments.

23. *Contra* of action of several natures, as *debt and trespass, debt and account*, &c. Br. Joinder in Action, pl. 97. cites 3 H. 4. 13.

24. *Debt upon an obligation of 20l. and demanded the same sum and certain chattels by one and the same præcipe*; Tirwit said the writ shall abate, because all is demanded in one and the same præcipe; but it was agreed, in the time of H. 8. that a man may have *debt and detinue* by one and the same writ, by several præcipes; for the

the ~~one~~ shall be debet, and the other detinet. Br. Several Præcipe, pl. 5. cites 3 H. 4. 13.

25. In a replevin the plaintiff counted of 4 oxen taken at divers days and places, and that the deliverance was made of 2, &c. and that he yet detains the other 2, ad damnum 40 s. and did not sever the damage, and yet good; and so see a replevin of \* several takings, and several days and places, and one entire damages. Br. Replevin, pl. 13. cites 7 H. 4. 11.

\* Thel. Dig. 106. lib. 10. cap. 15. l. 3. cites 10 E. 3. 508. 29 E. 3. 30.

26. Trespass by executors of breaking testator's close, and carrying away a certain sum of money, and admitted that it lies for the sum of money, but not for the breaking of the close, and so it lies in part, and in part not. Br. Joinder in Action, pl. 26. cites 11 H. 4. 3.

27. Audita querela containing 2 matters, the one performance of conditions, and the other of deceit, for delivering of the statute, contrary to his promise, and the writ was against a stranger to the statute, and held good; per opinionem. Thel. Dig. 106. lib. 10. cap. 15. l. 14. cites Hill. 12 H. 4. 15.

28. If a præcipe quod reddat be brought of land, parcel in guildable, and parcel in franchise, the writ shall abate. Br. Privilege, pl. 12. cites 14 H. 4. 21.

But in præcipe of rent out of land in guildable and land in

franchise the writ shall not abate, but the common law shall have jurisdiction. Br. Privilege, pl. 12. cites 14 H. 4. 21.

29. In præcipe quod reddat of 2 acres, whereof one is ancient demesne, the writ shall abate as to that, and stand as to the other. Br. Privilege, pl. 12. cites 14 H. 4. 21. per Huls.

30. A man brought scire facias to have execution out of a fine as heir to 2 parceners. Thel. Dig. 24. lib. 2. cap. 1. l. 38. cites Mich. 9 H. 5. 12.

31. One writ of trespass comprehended rescous, entry, and chasing in a warren, and assault of his servants. Thel. Dig. 107. lib. 10. cap. 15. l. 17. cites Trin. 3 H. 6. 53.

**[ 42 ]**

Parco fracto and rescous

may be joined, adjudged per tot. cur. though at first they inclined otherwise. 2 Lutw. 1259, 1260. Trin. 7 W. 3. *Alwayes v. Broom*.—Ld. Raym. Rep. 83. S. C. adjudged accordingly.

32. In rescous the plaintiff counted that J. held of him certain land in D. by certain services, and other certain land there by other services, and for the rent and services arrear he distrained, and the defendant made rescous, and broke his warren, and beat his servants, and the defendant demanded judgment of the writ, because he joined the rescous of several tenures in one and the same writ, and yet well; per tot. cur. Quod nota. Br. Rescous, pl. 1. cites 3 H. 6. 52.

Br. Joinder in Action, pl. 2. cites S. C. accordingly; per tot. cur. because the rescous is intire.

33. One writ upon the case contained, that the plaintiff for a certain sum had retained the defendant to do a certain thing, and that the defendant for the same sum had assumed to do this thing, &c. and it was held good, and not double. Thel. Dig. 107. lib. 10. cap. 15. l. 18. cites 11 H. 6. 21, 29. 69.

34. A man shall have several assumpsits in one and the same action upon the case, and the defendant shall answer to all, and divers

As a man may declare upon one

writ *all the covenants in an indenture,* vers issues may come upon them. Br. Action sur le Cafe, pl. 108. cites 11 H. 6. 24.

in the same manner he may have action upon the cafe for *all matters agreed in one and the same assumpsit*; per Newton. Quod non negatur, and so it is used now. Br. Action sur le Cafe, pl. 108. cites 11 H. 6. 55.—*Assumpsit express and implied* may be joined. Jenk. 331. pl. 62.—The case was this: goods were sold by A. to B. for 100l. whereof 50l. was to be paid at Lady-day, and the other 50l. on May 1. The first 50l. was duly paid, and then B. asked A. to take his bill off his hand for 40l. part of the other 50l. to be paid at Christmas after, which A. did; but neither the 40l. nor the other 10l. was then paid; whereupon A. brings assumpsit, and declares on the promise to pay the 40l. which the defendant made on A.'s accepting the said bill, and that A. had not paid the said 40l. nor the 10l. residue of the said 50l. and held good. Cro. J. 544. pl. 4. Mich. 17 Jac. B. R. Heath v. Dauntley.

Thel. Dig.  
107. lib. 10.  
cap. 15.  
f. 22. cites  
S. C.

35. Trespas for *hunting in 2 parks*, and good, though several punishments are given; for a man cannot have writ of ravishment of 2 wards, nor one quare impedit of 2 churches, and yet by the justices the writ is good; for *land of 20 titles* may be well joined in one writ of trespas. Br. Joinder in Action, pl. 120. cites 13 H. 7. 12.

36. A man cannot join in one and the same writ *things of which parcel of the process shall be distress infinite, and of the rest exigent*, and if this be apparent in the writ, the writ shall abate clearly, and the same law where it appears in the declaration, per Paston; but quære of his opinion; for this is permitted elsewhere often. Br. Brief, pl. 236. cites 14 H. 6. 1.

37. If a man *forges a deed concerning land in the county of W. and in the county of D.* he shall have one and the same writ of forger of deeds, though the land be in two counties. Br. Joinder in Action, pl. 75. cites 21 H. 6. 51.

Br. Patents,  
pl. 17. cites  
22 H. 6.  
11. S. C. &  
S. P. by  
Danby and Portington.

38. Where the *king grants to me the office of parkership in D. and S. and I am disseised*, I shall have two assises; for this is a several grant in itself. Br. Joinder in Action, pl. 34. cites 21 H. 6. 10.

Br. Patents,  
pl. 17. cites  
S. C. and  
S. P. by  
Danby and  
Portington; quod nemo negavit.

39. So where he grants to me *a fair in D. and S.* And so see that both shall not be joined in one assise, or in one action. Br. Joinder in Action, pl. 34. cites 22 H. 6. 10.

If land had  
been given  
to a brother  
and a sister,  
and the heirs

40. It was said that one writ of *formedon* lies of *divers gifts*. Thel. Dig. 106. lib. 10. cap. 14. f. 11. cites Pasch. 31 H. 6. 15. Quære.

[ 43 ] of their 2 bodies begotten, the remainder over in fee; if the brother dies without issue, now the sister has an estate for life in one moiety, the remainder over in fee; and for the other moiety she has estate tail, the remainder in fee; and after the sister has issue, and dies, and a stranger abate, now for her one moiety the remainder commences, and after the issue dies without issue, though the remainder happened at several times, yet he in remainder shall have one formedon; for both remainders which depend upon one and the same estate, are come to one and the same person. 8 Rep. 87. a. (c) cites 17 E. 3. 51. a. 78. a. b. and says that so the 31 H. 6. 14. b. is to be intended, where it is said that Trin. 7 Jac. B. R. a man may have formedon of divers gifts.

But see formedon in reverter conveying the descent by the count to 2 daughters, and that they died without issue, by which the land reverted to the demandant. Thel. Dig. 106. lib. 10. cap. 14. f. 12. cites Hill. 29 E. 3. 5. Quære.



41. A man shall have action of debt upon *divers contracts*. *Goods sold on two several times by A.* Thel. Dig. 106. lib. 10. cap. 14. cites Pasch. 31 H. 6. 15.

to B. *The goods first sold were paid for at the time agreed.* In an action for the rest of the money A. declared upon one contract for all the goods; but it was held that it ought to have been a several action upon the *several contracts*. Godb. 244. pl. 339. Hill. 11 Jac. C. B. Lambert's case.

42. Debt lies for *selling of cloaths, and for salary*, in one and the same writ; per cur. Br. Joinder in Action, pl. 86. cites 16 E. 4. 10.

43. A man shall have trespass *tam contra pacem regis H. 6. quam contra pacem regis nunc E. 4.* Quod nota, and shall recover damages for both times, and otherwise not. Br. Trespass, pl. 301. cites 2 E. 4. 24.

44. If A. has plaint of *replevin against J. C. and B. has another plaint of replevin against him*, they cannot have one and the same *recordare to remove those two plaints*, and cannot declare severally; for every one of them ought to have a *recordare* in this case. Br. Joinder in Action, pl. 62. cites 3 H. 7. 14.

tiff; for per cur. if there are divers plaints, they shall not be removed; and therefore the plaintiff may proceed in pais in their plaints. Br. Joinder in Action, pl. 62. cites 3 H. 7. 10.

45. In debt; *a man sold a piece of cloth and leased an acre of land for 40 s. at Michaelmas* \* [the money for the cloth and also the rent to be paid at Michaelmas] and *after the feast of Michaelmas he brought debt.* Keble demanded judgment of the writ; for the debt for the lease and the buying of the cloth cannot be joined in one contract; for they are of several natures; for the one is a duty immediately, and the other is no duty till Michaelmas that the defendant has had the occupation of the land demised; for by release of all actions before Michaelmas the debt of the cloth is determined, but not the debt of the land. But per Fisher, the action does not lie till Michaelmas for the one nor for the other, for it is the day of payment; by which the defendant was awarded to answer. Br. Dette, pl. 143. cites 7 H. 4.

46. One writ of *ravishment of ward*, for the ravishment of 2 daughters, was adjudged good. Thel. Dig. 106. lib. 10. cap. 15. l. 7. cites Pasch. 41 E. 3. Brief 541. But says, see that it is said the contrary Hill. 13 H. 7. 12.

47. Land was given to *father and son, and the heirs of their two bodies begotten, the remainder over in fee.* The father died without any other issue than the son, and the son died without issue; and a *stranger abates*, or the [son who was] survivor made discontinuance. Quære, per Prideaux, if *remaindorman shall have one formedon, or several*; and it seemed to Saunders, Brooke, and Brown, that one writ would be sufficient. Tamen quære bene. D. 145. a. b. pl. 64. Pasch. 3 & 4 P. & M. Anon.

estates in tail, as the remainder also depends upon one joint estate in the father and son for *their lives*, and all commenced at one time, therefore one *formedon in remainder* lies. — S. C. cited Arg. Le. 213.

48. In debt on 2 E. 6. 13. for not setting out tythes, plaintiff shewed that the *rector of M. had 2 parts and the vicar the third part*

S. P. per all the justices. Br. Trespass, pl. 314. cites 8 E. 4. 5. So if it be removed at the suit of the defendant, and not at the suit of the plaintiff.

\* Br. Joinder in Action, pl. 90. cites S. C. accordingly.

S. C. cited 8 Rep. 87. without any quære, and says that though the estates tail were several, yet inasmuch as the several

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Nov. 8.

Champion  
v. Hill. S. C.  
resolved ac-  
cordingly.  
—Mo. 914.  
pl. 1293.  
S. C. ad-  
judged ac-  
cordingly;  
for the suit  
is conceived  
upon the  
tort as well  
as upon the  
title.—  
Brownl. 86.  
Campion  
v. Hill. S. C.  
according-  
ly; but  
seems to be  
taken from  
Yelv.—  
Cro. J. 68.  
pl. 6. S. C.  
adjudged  
for the  
plaintiff.

part of the tythes, and laid it to be by *prescription* as to the man-  
ner of taking them by the parson and the vicar; and also that the  
*parson and vicar had by several leases demised the tithes to him,*  
and he so being *proprietary* of the tithes, the defendant carried  
away his corn without setting out the tenth part. It was found  
for the plaintiff, and moved in arrest of judgment that in this writ  
were comprised several actions upon this statute, as appears by his  
own shewing, he claiming under the several titles of the parson  
and vicar, and that as the parson and vicar could not join, so  
neither can the plaintiff; and if all the tithes had belonged to the  
parson he could not have this action against several tenants, for  
not setting forth their several tithes, because he cannot comprehend  
two actions in one; which Fenner granted, but all the other jus-  
tices contra. For though *parson and vicar* in this case cannot join,  
because *they claim by divided rights severally*, yet when *both their*  
*titles are conjoined in one person*, as here, then the matter of the  
title is conjoined also in one, and it *suffices generally to shew that*  
*the plaintiff is firmarius or proprietary* of the tithes, without  
saying of what title; for this is not a personal action, founded  
merely upon the contempt against the statute in not setting forth  
the tithes; nor does he by this action demand any tithes, so as the  
title may come in debate; but the *defendant is only to excuse him-*  
*self of the contempt.* Yelv. 63. Pasch. 3 Jac. B. R. Champenon  
v. Hill.

49. In *debt on the statute of usury*, 2 several usurious loans may  
be sued for by the same writ. Cro. J. 104. pl. 40. Mich. 3 Jac.  
B. R. Woody v. . . . .

A. seised of  
gavelkind  
had issue 3  
daughters,  
B. C. and D.  
devised all  
his land to B.  
in tail, the  
remainder of

50. Where a *gift* which is the foundation of a writ is distinct,  
and several in such cases upon the several foundations, several writs  
ought to be founded; and to make one writ sufficient, (even if  
they were the same parties or donees) the *foundation* ought to be  
*one, and at one time, and out of one root.* 8 Rep. 87. Trin. 7 Jac.  
in Buckmer's case.

*one half to C. in tail, the remainder of the other half to D. in tail, and if C. died without issue, the*  
*remainder of her moiety to D. and her heirs of her body, with like remainder to C. for default of issue*  
of D. Afterwards B. dies and C. dies without issue, B. having first discontinued, (as appeared by  
the manner of pleading) and afterwards D. died. In a *formedon* in remainder brought by the heir  
of D. it was resolved, that the whole being devised to B. in tail, notwithstanding that the deviser  
divided the remainder by moieties, yet when all the land remained to D. and all the remainders  
depended upon one estate, and commenced by devise at one time, the heirs of the body of D. shall  
have a *formedon* in remainder in the same manner as if the remainder had been limited to C. and  
D. and the heirs of their two bodies, the remainder, for default of issue of C. to D. and to her heirs  
for ever. 8 Rep. 86, 87. b. Trin. 7 Jac. B. R. Buckmer's case.—2 Brownl. 274. Buckmer v.  
Sawyer, S. C. and it seemed accordingly to all the justices.

And in  
personal ac-  
tions, several  
causes of ac-  
tion may be  
compre-  
hended in  
the same  
writ as

51. There is a difference between *actions real* and *actions per-*  
*sonal*, and between *actions real which are founded on a title in the*  
*writ* and *actions real which are founded on wrong or forcement,*  
*and contain no title in them*; in this last case the demandant may  
demand in one writ diverse lands and tenements which came to  
him by diverse several titles, As if diverse manors descended to me  
from diverse several ancestors, and I am disseised or deforced of  
them, I may have writ of right or entry in nature of an assise,  
or

or writ of *assise*, and comprehend all those rights in one and the same writ, because in those cases no title is made in the writ. But if I bring writ of *entry sur disseisin* done to my mother and to my aunt, coparceners in fee simple, the writ shall abate; for here title is made in the writ; and it appeared that there were several causes of action, because the title is by several ancestors. 1 Rep. 87. b. Trin. 7 Jac. in Buckmer's case.

*Trespass for trespasses done in several places, and at several times; And so for Waste upon several leases. Ibid.*

—And so of debt on several leases. Ibid.

52. The testator's promise for his debt, and the executor's promise for his own debts, cannot be joined in one action against the executor, for they require different judgments. Jenk. 296. pl. 49.

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Hob. 88.  
pl. 116.  
Hill. 12

Jac. S. C. adjudged for the plaintiff, but judgment reversed: for he ought to be charged by 2 several actions, one charge being in his own right, and the other as executor.

53. Debt lies upon 3 several obligations in one action. See Hob. 178. pl. 205. Andrews v. Delahay.

Brownl. 68.  
Hill. 14.  
Jac. S. C.  
5 Mod. 213.

that it was brought on 2 bonds.—S. C. cited

54. Ejectment and trespass for assault and battery were brought against the defendant; upon Not Guilty pleaded the plaintiff had a verdict both for the ejectment and battery, and entire damages assessed; the court took time to advise what judgment should be given, because it was without precedent, but the damages for the battery could not be released, because they were entire with the ejectment. It is said there, that it seems to be holpen by the verdict. Hill. 16 Jac. Hob. 249. Bird v. Snell.

Brownl. 235, Bide v. Snelling, S. C. says the damages were found severally, and the plaintiff had released the

damages for the battery, and prayed judgment for the ejectment, that Winch held the writ naught, but judgment was given for the plaintiff notwithstanding.

55. Case for that the plaintiff had lent to the defendant a gelding to ride from L. to E. and there to be delivered to the plaintiff, the defendant intending to deceive the plaintiff, rode upon the said gelding from L. to E. and from E. unto L. again, and thereby so much abused the said horse, that he became of little value, and though the plaintiff at E. required a re-delivery, yet the defendant then did, and yet does refuse to deliver him, and the same day at E. converted him to his own use, &c. It was moved, that the non-delivery according to the contract at E. and the misusing him in the journey, are several causes of action, and should not be joined in one action. But per tot. cur. when he denied the re-delivery, and afterwards converted him to his own use, the plaintiff may well have action for both, and together; and though perhaps the defendant might have demurred, (as Ld. Hobart conceived) for the doubleness of the declaration, yet he having pleaded Not Guilty, and being found guilty, that makes the declaration good. Cro. C. 20. pl. 13. Mich. 1 Car. C. B. White v. Rylden.

56. In case the plaintiff declared upon the custom of the realm, that the defendant, 10 May, was a common carrier, and that the plaintiff, 6 May, was possessed of 50l. which on the same day, &c. he delivered to the defendant to carry, which he did so negligently

Keb. 352.  
pl. 57.  
Matthews v. Hopping, S. C. adjor-

natur.— that it was lost, and also declared in trover for the same sum. It  
 Ibid. 870, was moved in arrest of judgment, that *case and trover* could not be  
 pl. 19. S. C. joined, because one is founded on a custom, and the other on a  
 and by Twisden J. wrong, to which it was answered that the plea of Not Guilty goes  
 a tort with to both; but per cur. this declaration is ill. Sid. 244. pl. 5. Pasch.  
 which Tro- 17 Car. 2. Matthews v. Hopkin.  
 ver may be joined,

must be such as implies force and arms; but what is generally called Tort, as where-ever any  
 parlance is of malice and fraud, or negligence, is not sufficient to be joined with a trover; and  
 judgment for the defendant.

Plaintiff declared in *case upon the custom of the realm against a common carrier, and also upon trover  
 and conversion*. Hale Ch. J. held it well, because Not Guilty answers both. Vent. 223. Mich.  
 24 Car. 2. B. R. Owen v. Lewyn.

5 Mod. 91. cites the case of Matthews v. Hopkins, and says the judgment was arrested, be-  
 cause the plaintiff had alleged that the defendant was a carrier on the 10th of May, and that he was  
 possessed of goods on the 6th of May, on which day he did deliver them, so that it did not appear  
 that he was a carrier on the day of the delivery; and the S. C. was cited *ibid.* 92. per cur. and said  
 it was held, that these are different actions, and ought not to be joined, and the principal case being  
 on the same point, they gave judgment for the defendant. Trin. 7 W. 3. Dalston v. Janson.—

[ 46 ] 1 Salk. 10. pl. 2. in S. C. of Dalston v. Janson, judgment was arrested, because the  
 assumpsit is Ex quasi contractu and a contract and a tort cannot be joined; and Holt  
 Ch. J. said he had seen the record of Matthews v. Hopkins 1 Sid. 244. in which case  
 the judgment was arrested.—12 Mod. 73. Dalston v. Eyenson, S. C. accordingly,  
 and judgment arrested.—Comb. 333. Darlston v. Hianson, S. C. says, that upon the whole  
 the court seemed to incline for the plaintiff; sed adjournatur.—3 Salk. 204. pl. 10. Dalson v.  
 Tyfon, S. C. adjudged ill.

57. In action sur case on two promises for not delivering two  
 bonds, the latter promise being aggravated by delivery of two forged  
 bonds instead of them, to which the defendant demurred, here be-  
 ing *promise and disceit*, which cannot be joined, which the court  
 agreed; but here the disceit being not the matter of the promise,  
 but aggravation, it is well enough, and may be helped, however,  
 by a nolle prosequi as to one; and judgment pro plaintiff. 2 Keb.  
 803. pl. 52. Trin. 23 Car. 2. B. R. Vere v. Hillam.

2 Lev. 101.  
 Holms v.  
 Taylor,  
 S. C. that  
 they were  
 joined in  
 one action  
 by several  
 declara-  
 tions, and

59. *Assumpsit and trover* in one declaration; the defendant  
 pleaded Non Assumpsit as to the assumpsit, and Not Guilty as to  
 the trover. The jury found for the plaintiff upon the assumpsit, and  
 for the defendant upon the trover; a writ of error was brought,  
 and the joining the actions was assigned for error; sed adjournatur;  
 but the reporter says it seems not to be good. Raym. 233. Mich.  
 25 Car. 2. B. R. Tailour v. Holmes.

Hale Ch. J. held, that though by the verdict the causes were severed, yet since no such action lies,  
 the declaration is ill ab initio, and the judgment ought to be void; but Twisden doubted if the  
 severance by the verdict has not made it good, though ill at first; adjournatur.—Freem. Rep.  
 360. pl. 462. S. C. adjournatur.—Ibid 367. pl. 471. The court seemed to incline they would  
 not lie together; but *advizare volunt*.

*Trover and assumpsit* lie not together, and though the jury found the trover for the defendant, and  
 the assumpsit for the plaintiff, and so had severed them, yet the declaration being ill at first, the  
 plaintiff cannot have any judgment; per tot. cur. 3 Lev. 99. Pasch. 35 Car. 2. C. B. Bage v.  
 Bromuel.

3 Keb. 331.  
 pl. 27. Ro-  
 botham v.  
 Baily, S. C.  
 but ob-  
 scurely re-  
 ported.

60. An action was brought for *battery of a servant, per quod  
 servitium amisit*, and for taking 9 pounds of butter; after verdict the  
 court held, that the one was case, and the other trespass, and there-  
 fore they could not be joined. Arg. Ld. Raym. Rep. 273. cites  
 Hill. 25 & 26 Car. 2. B. R. Robinson v. Baily.

64. *Debt on a bond and a mutuat* may be joined, though there must be several pleas; for Nil debet, which is proper for the one, will not serve for the other. Per cur. Arg. Vent. 366. Mich. 34 Car. 2. B. R.

Where several actions are brought for several causes, the

court may compel to join them in one, where they may be joined; but where several pleas are requisite, as in *assumpsit* and *trover*, they cannot be joined. Per Holt. Cumb. 244. Pasch. 6 W. & M. in P. R. Saracini v. Kilner.

64. In case the plaintiff declared on an *assumpsit* to deliver pot-ashes, merchantable commodities, but that defendant delivered dirty ones, and declared also on a warranty; but adjudged that *assumpsit* and *warranty* are of several natures, the one in the tort and the other in the right, and so cannot be joined. 2 Show. 250. pl. 256. Mich. 34 Car. 2. B. R. Beningsage v. Ralphson.

The warranty (being of a personal thing as pot-ashes, &c.) is in nature of a contract as well

as the *assumpsit*, and so the court took time to advise, and afterwards the plaintiff struck out that part relating to the warranty. Skin. 66. pl. 12. Bevingsay v. Ralston, S. C.—Vent. 365. Devison v. Ralphson, S. C. and the court were of the same opinion that they could not be joined; sed adjournatur.

65. *Trespass for battery of the wife and taking husband's goods*, cannot be joined. Show. 345. Hill. 3 W. & M. in B. R. Meacock & Ux' v. Farmer.

Action was brought by the baron alone, for a battery of

himself, and also of his wife, per quod consortium, &c. *amist*, and held good without the wife's joining; for it is not brought in respect of the harm done to the wife, but for his own particular loss in losing her company. Cro. J. 501. pl. 11. Mich. 16 Jac. B. R. Gay v. Liveley.

66. *Where there may be several pleas*, actions ought not to be joined. Notes in C. B. 250. Pasch. 7 Geo. 2. Jeffs v. Jones.

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**(W. c) Joinder in Action, where the Demand, See (U. c) Charge, &c. is in different Respects.**

1. ENTRY in the post the tenant vouched, and the writ was brought against two, and the vouchee disclosed the case to be that a *disseisor* died, and his heir entered and endowed the feme of the disseisor, and aliened the other two parts, and therefore ought to be several writs, the one against feme in the Per, for she is in by her baron, and the other against the alienee of the heir in the Per and Cui. Br. Joinder in Action, pl. 39. cites 24 E. 3. 40.

2. It was said by Rolfe, That if my tenant holds of me diverse parcels of land by several services of chivalry severally and dies, his heir within age, and a stranger gets the possession of all the land, I ought to have several writs of ward. Quære. Thel. Dig. 107. lib. 10. cap. 15. f. 17. cites Trin. 3 H. 6. 53.

3. If a man holds two acres of land of one lord by several services, and dies without heir, the lord cannot have one writ of escheat of both, but shall have several writs. Br. Escheat, pl. 13. cites 21 H. 7. 39. Per justiciarios.

Br. Joinder in Action, pl. 46. cites S. C. and S. P. accordingly; but

Brooke says it seems that he may have one writ by several præceptes.



Brownl. 20.  
S. C. ad-  
judged ac-  
cording-  
ly.—

2 Brownl.  
56. S. C.  
argued, and  
adjournatur.  
—2 Bulst.

102. St. John v. Piott, S. C. adjudged accordingly in C. B. and upon a writ of error brought, and other errors assigned for other collateral matters in the declaration, this matter remained unquestioned.—S. C. cited Lev. 110. the court said that in this case Pyot was tenant in common with himself.

Jenk. 296.  
pl. 49. S. C.  
accord-  
ingly; for  
they re-  
quire dif-  
ferent judg-  
ments.

4. A. seised of one house in fee and possessed of another for term of years, makes a lease of both houses to B. rendering 10l. per ann. and B. covenanted to repair it. Afterwards A. grants the fee of one by one deed, and the reversion for years of the other by another deed to C.—C. brought one action of covenant for not repairing the two houses; and adjudged well brought. Cro. J. 329. pl. 8. Mich. 11 Jac. C. B. Pycot v. St. Johns.

5. Assumpsit against an administratrix, and declares for goods sold to the intestate for 200l. and for other goods sold to the defendant herself for 27l. and that upon account the defendant was found indebted to the plaintiff in those sums, and promised payment. The charge being in several manners, one in her own right and the other as administratrix, there ought to have been several actions; And judgment reversed. Hob. 88. pl. 119. Hill. 12 Jac. Herrenden v. Palmer.

6. An administratrix declared that defendant was indebted to her in 300l. but did not say to her as administratrix, and then declares for another debt due to her as administratrix, &c. It was moved in arrest of judgment, that the first promise must be intended of a debt due to her in her own right, notwithstanding she concluded with a profert of the letters of administration, that being only to warrant the 2d count in right of the intestate; But adjudged by 3 justices against the opinion of Twisden J. that both might be joined in one declaration, and that after a verdict it shall be intended that the first debt was due to her as administratrix. 2 Lev. 110. Trin. 26 Car. 2. Curtis v. Davis.

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7. Trover and an action upon the case were joined, and the court stopped the action and made the attorney pay costs. Cited per Pemberton Ch J. Mich. 34 Car. 2. Skin. 66. 67. cites it as a case in C. B.

Show. 366.  
S. C.—  
And upon  
opening the  
cause, the  
court ex

8. Action by administrator who declared on an *Indebitatus assumpsit* to intestate, and an *Insimul computasset* between plaintiff and defendant for money due to the plaintiff himself, is ill. 1 Salk. 10. pl. 1. Trin. 4 W. & M. in B. R. Rogers v. Cook.

*officio abated the bill*, because it appeared on the record itself that the several demands in the declaration were incompatible and could not be joined in one and the same action; for it requires several judgments, and of distinct natures. Carth. 235. 236. S. C.—1 Salk. 10. pl. 1. reports that the reason why a plaintiff cannot prosecute his own right and another's in one action is, because the costs to be recovered are intire, and then plaintiff cannot distinguish how much he is to have as administrator, and how much as his own.

A promise to  
the intestate  
and a pro-  
mise to the  
administrator  
cannot be  
joined, and  
upon a de-

9. Indebitatus assumpsit by the plaintiff as executor of B. and declared of a promise to the testator himself and a promise to the executor upon stating the accounts between the executor and the defendant touching only the dealings between the testator and him. The court held that the promises might well be joined in one action; that the taking the account did not at all vary the



the nature of the debt; that the plaintiff lay under a necessity of naming himself executor to introduce the cause of action; that the pleading, the judgment, and the effect of the judgment being here all the same, there could be no reason for dividing them and multiplying actions. 10 Mod. 170. Trin. 12 Ann. B. R. Nutton v. Crow.

murrer it would be ill. But a *Remittit damna* after verdict will cure it. 11 Mod. 196. M. 7 Ann.

B. R. Tate v. Whiting.—But where in the same action *several premises to testator* were joined with a promissory note to himself *Us executori*, it was adjudged upon demurrer for defendant; for plaintiff might either have brought his action on this note without naming himself executor, or might have transferred it to any other person by indorsement; and the naming him executor is only a description of his person. 10 Mod. 315. Pasch. 1 Geo. B. R. Betts v. Mitchel.

**(X. c) Where several Persons for the same Fact or Thing may have several Actions.**

1. **I**F two are convicted as disseisors in assise, yet the one only may have attaint without the other. Br. Joinder in Action, pl. 50. cites 8 Ass. 30.

2. *Attaint*; A man brought one writ by several *præcipes*, and all pleaded to traverse the action, and the roll made mention but of one jury, which said jury [&c.] And so against the demandant it is but one jury, and one attaint only may be brought by him; but the tenants shall have several attaints; for it is a several jury against them. Br. Joinder in Action, pl. 51. cites 14 Ass. 2.

3. If profits apprender are granted to a commonalty in guildable out of the forest, the claim must be made by them all, nevertheless otherwise it is if the claim is made within the forest, where every one shall have action by himself of that which to him belongs; per Bank. Br. Forest, pl. 3. cites 21 E. 3. 48.

4. In trespass and such like action personal, tenants in common ought to join in action, and yet in assise and action real they shall not join. Br. Joinder in Action, pl. 9. cites 43 E. 3. 23.

5. If a man levies the rent of my tenant by coercion of distress, I shall have assise, and yet the tenant may have trespass; for this is an act which gives double cause of action, as battery of my servant, &c. Br. Trespass, pl. 259. cites 43 Ass. 9.

6. *Trespass for taking beasts agisted* may be brought either by the owner or agistor. Br. Trespass, pl. 67. cites 48 E. 3. 20. per Cand. Br. Brief, pl. 514. cites S. C. that the

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agistor shall have trespass and the owner may have *replevin*. So tenant by elegit and tenant of the franktenement may each of them have assise. Br. Trespass, pl. 67. cites 48 E. 3. 20. per Cand.—Br. Brief, pl. 514. cites S. C.

But when one recovers, the action of the other is gone. Br. Trespass, pl. 67. cites 41 E. 3. 20. per Perley.—Br. Brief, pl. 514. cites S. C.—S. P. Arg. Skinn. 257. of tenant by elegit and tenant by statute merchant, cites 33 H. 6. 22. per Moyl.

7. *Maintenance* was brought by two, because the defendant maintained one G. against the plaintiff in action of trespass brought by the said parties against the said G. and in truth there were three parties *Contra* if the maintenance had been upon a real ac-

• As in præcipe quod reddat. Thel. Dig. lib. 2, cap. 12. f. 5. cites 18 H. 6. 5.

tion; for there is severance in the first action, and therefore

they may sever in the action of maintenance. Contrary in trespass, there they could not have severed. Quære the reason thereof; for it was not adjudged. Br. Joinder in Action, pl. 44. cites 14 H. 6. — Thel. Dig. 32. lib. 2. cap. 12. l. 5. cites S.C. — See 31 H. 6. & 36 H. 6. 27. 29. at (C. d)

in the action of trespass, and two brought action of maintenance alone. And per June Ch. J. where the maintenance is supposed in action personal, all ought to have joined. Br. Joinder in Action, pl. 44. cites 14 H. 6.

8. If I lease land at will, and a stranger enters, and digs the land, the tenant shall have trespass of his loss, and I shall have trespass for the loss and destruction of my land; per tot. cur. Br. Trespass, pl. 131. cites 19 H. 6. 44. 45.

9. And if a man beats my servant, I shall have trespass for the loss of the service; and the servant another action of his wrong and damages sustained; per tot. cur. Br. Trespass, pl. 131. cites 19 H. 6. 44. 45.

10. If the sheriff arrests a man by capias, and does not return the writ, the party who was arrested shall have writ of trespass, or of false imprisonment, and the other party shall have recovery also; per Paston. Br. Trespass, pl. 137. cites 21 H. 6. 5.

11. If estate for life, remainder over, be made by deed, the deed belongs to the tenant for life during his life; and yet if a stranger gets the deed, he in remainder shall have one action of trespass, and the tenant for life another action; and if land contained in one deed be parted between parceners by partition, every one of them shall have an action of trespass. Br. Forger de Faits, pl. 6. cites 33 H. 6. 22. Per Prisot.

12. Where 2 plead Not Guilty in trespass, and are found guilty, they may sever in action of attain upon it of the principal, because it is several pleas. Contrary upon a joint plea, as release, or the like; but contrary of the damages; for this is intire, therefore they shall join in attain, or abridge his demand of the damages; for it was agreed that where the defendants join in answer, as they plead release or the like, they cannot sever in attain for the principal; so for the damages, notwithstanding that their pleas are several; for yet the damages are intire, and therefore shall not be severed. Br. Joinder in Action, pl. 4. cites 34 H. 6. 12.

13. And in conspiracy against two, the one pleaded Not Guilty, and the other pleaded another plea, and the issue found against both to the damage of 100l. and the one alone brought attain; and upon long argument it was awarded that it shall lie of the principal, and that he shall abridge his demand of the damages. Br. Joinder in Action, pl. 4. cites 34 H. 6. 30. & 35 H. 6. 19.

14. And where feoffment is made to two and the heirs of the one, and they lose by default in præcipe quod reddat, yet the one shall have writ of right, and the other quod ei deforceat of their moieties. Br. Joinder in Action, pl. 4. cites 34 H. 6. 12.

15. If 2 barons and their femes are, and they alien in fee, and the barons die, the femes shall have several cui in vitalis; per Davers. Ibid.

Br. Joinder in Action, pl. 33. cites 40 H. 6. S.P.

16. If 2 men are sued in the Court Christian for scandal, battery, or the like, which is several in itself, there every one of them shall have attachment upon prohibition by himself; but where they are sued for finding of a lamp, &c. by reason of their land which they have, there they shall join in attachment upon prohibition. Note the diversity of a joint cause and several cause. Br. Joinder in Action, pl. 4. cites 34 H. 6. 43. Per Littleton. See (C. 8)  
31 H. 6. 21.

17. If a man bails his goods to W. N. and a stranger takes them, each of them, viz. the bailee and the owner shall have trespass or detinue; and if the one recovers, he shall have audita querela against the other who sues forth. Br. Audita Querela, pl. 32. cites 5 H. 7. 15.

18. A. delivers 40 l. to B. to be delivered to C. and D. to be divided between them. They bring two several actions of debt for their respective 20 l. Adjudged well brought, and affirmed in error. Jenk. 263. pl. 64. Mich. 44 Eliz. C. B. Wherimwood v. Shawe.

19. If A. bails goods to B. to bail over to C. and B. does not bail them over, as he ought to have done, but converts them to his own use, either A. or C. may bring his action against B. but both shall not have the action; but he that first begins his action shall go on with the same. Bullst. 68. Mich. 8 Jac. in case of Flewelling and Rave.

20. If a bond debt due to a bankrupt is assigned to 2 creditors, part to one, and part to another, the act of parliament operates upon it, and therefore they shall sue severally; per Warburton J. Godb. 196. pl. 282. Trin. 10 Jac. C. B. Anon.

21. Where goods of 3 several persons are delivered to merchandize, each party may bring his action for his 3d. part, and judgment for the plaintiff. Cro. J. 410. pl. 10. Mich. 14 Jac. B. R. Hackwell v. Eustman.

22. If a 3d person be to have the benefit of a promise, as where a promise is made to the father for the benefit of the son, there they cannot join; but either of them may bring the action; but in such case the declaration must be of a promise made to the father, though the son brings the action. Per cur. Hardr. 321. pl. 3. Hill. 14 & 15 Car. 2. in the Exchequer, in case of Bell v. Chaplain.

23. When words are spoken in the plural number, all may bring actions; but they must have several actions, and cannot join. Per cur. Keb. 525. pl. 15. Trin. 15 Car. 2. B. R. Henacre, &c. v. . . . .

24. Case by an owner of a 5th part of goods in a ship, lying infra corpus com. and ready to sail, and that the defendant stopped his voyage, by getting an order of council for arresting her by process out of the admiralty, by which the voyage was lost. It was agreed, that though here was but one act, and but one offence, yet every several person injured may have an action, and recover damages. 1 Salk. 31. 32. pl. 2. Pasch. 5 W. & M. in B. R. Child v. Sands, 3 Lev. 390  
S. C.

25. An

3 Mod. 321.  
Mich. 2 W.  
& M. in  
B. R. S. C.  
adjudged  
accord-  
ingly; and  
that in all  
cases  
grounded

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upon con-

tracts the parties who are privies must be joined in the action.—2 Lev. 258. [though wrong  
paged as 268.] S. C. adjudged accordingly.—Show. 478. pl. 442. Trin. 2 Jac. 2. adjournatur.  
—Show. 29. S. C. adjournatur. Ibid. 101. adjudged for the defendant.—Skins. 278. pl. 1.  
Boulston v. Hardy, S. C. adjudged by 3 justices for the defendants; but Dolben J. e contra, because  
it might have been pleaded in abatement.—1 Salk. 440. pl. 1. S. C. adjudged for the defendant,  
because all the owners were not joined, this being not an action ex delicto, but ex quasi con-  
tractu; and that it was not the contract of one, but of all; and that there was no other tort but  
a breach of trust.—Carth. 58. S. C. says judgment was given for the plaintiff.—Comb. 116,  
S. C. says he was informed that it was adjudged, that the owners ought all to have been joined.

25. An action was brought against the defendant, for that he  
and 7 other persons were proprietors of a vessel which used to  
carry goods for hire, and that the plaintiff's goods were damaged  
by the negligence of the defendant, who was one of the proprie-  
tors, against whom alone the action was brought. There it was  
held; that though there was no actual contract between the plain-  
tiff and the part owners, yet they all, having an equal benefit, and  
the ground of the action arising upon a trust, which supposes a con-  
tract, the action ought not to be brought against one, but all.  
4 Mod. 181. cites it as adjudged in B. R. Boson v. Sandford.

26. The plaintiff having brought 3 several actions against 3 se-  
veral indorsers of one and the same note, motion was made that the  
plaintiff might make her election against which of the 3 several  
defendants she would proceed, and that proceedings might be  
stayed against the other two. Page J. said, that the plaintiff could  
not take out execution but against one of the defendants; however  
thought that the plaintiff had a right to proceed to judgment against  
all. Accordingly the motion was refused, Judge Probyn absent.  
2 Barnard. Rep. in B. R. 313. Trin. 6 Geo. 2. 1733. Wirley v.  
Budder,

### (Y. c) Where several may join.

1. **T**WO cannot join in *assise of a corody* to make their plaint,  
that each of them should have certain robes, bread, or  
beer, &c. Thel. Dig. 25. lib. 2. cap. 2. f. 8: cites 30 E. 1. Itin.  
Cornub. Joinder in Action, 32.

See (X. c)  
34 H. 6. 43.  
—See (C. d)  
31 H. 6. 1.

2. Several may join in *writ of attachment upon a prohibition*.  
Thel. Dig. 32. lib. 2. cap. 12. f. 3. cites Trin. 13 E. 2. Mich.  
10 E. 3. and Trin. 28 E. 3. 95. Joinder in Action 2. 5. 6. and  
that so is the opinion of 14 H. 6. 9.

3. And see an *attachment upon a prohibition* brought by three in  
common, for that they were sued in the spiritual court, because they  
brought a writ of land, &c. Br. Joinder in Action, pl. 50. cites  
8 Aff. 30.

4. And if an *assise* be brought against several tenants who lose,  
they all may have one suit to reverse the judgment; and if it be re-  
versed, every one shall have that which he lost. Ibid.

5. Two brought writ of error of a judgment given against them  
in *assise of freshforce*, and pending this the one died, by which the  
one who survived, and the heir of the other, brought new *scire facias*;  
and good, and the court proceeded and reversed the judgment.  
Br. Joinder in Action, pl. 53. cites 19 Aff. 7.

6. *Affise against three. Two were attainted, and the third acquitted of the disseisin, and all three joined in attaint; and he who was acquitted was summoned and severed: and after the defendant pleaded the joinder of them who was acquitted and severed to the writ, by which the writ was abated per judicium, and yet after severance. Br. Joinder in Action, pl. 78. cites 21 Aff. 14.—But 39 E. 3. and 11 H. 4. contra.*

7. *If two infants alien in fee, they shall not join in Dum fuit infra statem, but shall have several actions, as it seems. Br. Joinder in Action, pl. 30. cites 21 E. 3. 50.*

S. P. Br. Dum fuit, &c. pl. 2. cites S. C.

—Ow. 106. Arg. S. P. cites 29 E. 3.

8. *Contra where two are disseised, &c.* Br. Ibid.

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S. P. Br. Dum fuit, &c. pl. 2. cites S. C.

9. *In affise four jointenants are; two disseise the other two, they shall have affise in name of the four, quod disseiverunt eos, and the two shall be summoned and severed. Br. Joinder in Action, pl. 55. cites 23 Aff. 9.*

10. *But if two jointenants are, and the one disseises the other, he shall have affise of the moiety, and shall not join. Ibid.*

11. *But where two jointenants are disseised, and the one re-purchases the whole land, the other shall have affise in the name of both, and the other shall be summoned and severed. Ibid.*

12. *Fine was levied to A. for life, the remainder to 2 barons and their femes in tail, the tenant for life died, the 2 barons and their femes had issue, and died before entry, the one issue and a stranger entered, and the other issue brought scire facias upon a fine de medietate, and good; for it was agreed that the issues in tail ought to sever in action, and not to join in action; for it is a joint gift, and several inheritance. Br. Joinder in Action, pl. 38. cites 24 E. 3. 29.*

Thel. Dig. 25. lib. 2. cap. 2. f. 7. cites S. C. and Fitzh. Joinder in Action, 10. but adds quare, and says see

Mich. 38 E. 3. 26.

13. *And where coparceners are disseised they may join in action, but \* their heirs shall sever in action; per cur. Br. Joinder in Action, pl. 38. cites 24 E. 3. 29.*

If 2 sisters are disseised, and the one dies, the other shall

*have affise of the moiety, and the issue of the other writ of entry sur disseisin; per Thorp. Br. Joinder in Action, pl. 12. cites 45 E. 3. 3.—S. P. Br. Joinder in Action, pl. 7. cites 48 E. 3. 14.*

\* The one shall have action of the one moiety, and the issue of the other writ of entry sur disseisin of the other moiety, and when they have recovered and had execution they shall be coparceners again. Br. Joinder in Action, pl. 43. cites 39 H. 6. 8.

It was ruled by Holt Ch. J. at Rygate in Surry, Summer assizes, 10 W. 3. upon evidence at a trial, that coparceners may join in ejectment; and (by him) the case in † Moor 682. n. 939. is not law, Ld. Raym. Rep. 726. Boner v. Juner.

† This is the case of Milliner v. Robinson. Mich. 42 & 43 Eliz.

14. *Three coparceners made partition in chancery, upon which one granted rent to the two of 100s. per annum, by these words, viz. 50s. to the one, and 50s. to the other, and also joined in scire facias in B. R. super tenorem recordi ibidem missi, and exception taken that the rent is a several rent by the words subsequent; & non allocatur; but the joinder awarded good. Quod nota. Br. Joinder in Action, pl. 79. cites 29 Aff. 23.*

15. *Trespasse*

15. *Trespass against 2*, who pleaded *Not Guilty* and both found guilty, and they joined in *attaint*, and exception taken, that upon the several pleas there ought to be several attainments, and yet the writ awarded good. Br. Joinder in Action, pl. 80. cites 30 Aff. 49.

16. *Executor who survives* shall have action alone, and the executor of the executor who is dead shall not join with the first executor who survived. Br. Joinder in Action, pl. 28. cites 38 E.

3. 17.

17. And where 2 have wood in common, and make a bailiff, and the one makes executor and dies, and the other after makes his executor and dies, the executor of the survivor alone shall have the action of account, and the executor of the other shall not join. Ibid.

If 2 coparceners are, and the one has issue and dies, and the issue and the other

18. Per Belk, if a man has 2 daughters, and dies seised, and a stranger abates, and the one has issue and dies, the aunt and the niece shall join in *mortdancestor*; quod non negatur. Br. Joinder in Action, pl. 12. cites 45 E. 3. 3.

enter and are disseised, they may join in assise, because the coparcenary continues, and so if there were twenty disseised where the coparcenary continues and no partition had; per Danby and Littleton. Br. Joinder in Action, pl. 40. cites 9 E. 4. 14.

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See 44 E. 3.  
21. at (Z. c)

Br. Joinder  
in Action,  
pl. 16. cites  
S. C. ac-  
cordingly,  
because

they were joint plaintiffs in the assise.—Thel. Dig. 32. lib. 2. cap. 12. f. 4. cites S. C. adjudged accordingly, but cites it adjudged 19 R. 2. that 2 cannot join in writ of conspiracy.

See 31 H. 6.  
2. at (C. d)

19. Two men brought *Quod ei deforcat upon estate tail as heirs in gavelkind*, quod clamat & heredibus de corporibus suis exeuntibus and yet the writ good by the opinion of the court. Br. Joinder in Action, pl. 14. cites 46 E. 3. 21.

20. If 2 bring assise which passes against them by conspiracy of others, and they two join in writ of conspiracy against them, it is good by award; Quod nota. Br. Conspiracy, pl. 10. cites 47 E. 3. 17.

21. But 2 brought writ of *champerty* in common. Thel. Dig. 32. lib. 2. cap. 12. f. 4. cites 47 E. 3. 6.

22. Four barons and their femes brought writ of entry sur disseisin en le post of a disseisin made to the same ancestor, and counted how 4 sisters were seised in fee, and was to descend from two to two others, and from those two to two of the demandants as to cosins and heirs, and to the other two as daughters and heirs of those who were disseised, and because they ought to have several actions the writ was abated; for though the ancestor may have assise in common, yet the heirs shall have several actions. Br. Joinder in Action, pl. 17. cites 48 E. 3. 14.

See 39 E. 3.  
7. at (Z. c)  
—S. P.  
Thel. Dig.  
31. lib. 2.

cap. 10. f. 1. says it appears in diverse ancient books, and in F. N. B.—And Thel. Dig. 32. lib. 2. cap. 12. f. 4. cites 8 E. 4. 16. that several may join.

Br. Reple-  
vin, pl. 12.  
cites S. C.  
and says

24. If J. S. is possessed of 3 oxen, and W. N. is possessed of 4 horses, &c. there if a man distrains all those beasts, J. S. and W. N. cannot join in replevin, because they have several properties, and it



is a good plea to 3, that J. S. is owner, absque hoc that W. N. any thing thereof has, and that W. N. is owner of the 4, absque hoc that J. S. any thing thereof has. Br. Joinder in Action, pl. 74. cites 3 H. 4. 16.

that the writ shall abate. S. P. and therefore they were

not suffered to count. Br. Retorne de Avers, pl. 14. cites 8 H. 4. 21. — Br. Replevin, pl. 37. cites 12 H. 7. 4. S. P. — Br. Joinder in Action, pl. 63. cites 12 H. 7. 5. S. P. — Ow. 106. Arg. S. P.

25. If a man joins with a monk in action, all the writ shall abate, because the monk is not a person able to bring action. Br. Joinder in Action, pl. 72. cites 7 H. 4. 1.

Where one is bound to an abbot, and J. N. not naming him his

meet, in the obligation, yet the abbot shall have the action alone, and surmise that the other was commoner at the time, &c. Quod nota; per judicium. Br. Dette, pl. 190. (191) cites 32 H. 6. 30. — Br. Obligation, pl. 77. cites S. C.

26. If 40 are outlawed in appeal brought by feme of the death of her husband, they may join in writ of error upon it, or sever at their pleasure; but if they join all ought to appear, or otherwise the defendant never shall be demanded. Br. Joinder in Action, pl. 24. cites 7 H. 4. 45.

27. Three men joined in *Homine replegiando*, and no exception taken but admitted good; quod nota. Br. Joinder in Action, pl. 25. cites 8 H. 4. 2.

Thel. Dig. 32. lib. 2. cap. 12. f. 2. cites Hill 8 H. 4. 137.

[but seems misprinted] that 2 or 3 men cannot join in this writ; but says that the contrary was held 8 E. 4. 16. propter favorem libertatis.

28. But anno 8 H. 4. 21. per cur. they ought not to join, and therefore were not permitted to count, but were let to go, and the defendant prayed deliverance from them, and could not have it because they had found surety to sue with effect, so that the defendant might have execution against the mainpernors. Br. Joinder in Action, pl. 25.

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29. Two shall not join in *false imprisonment*. Arg. Ow. 106. cites 8 E. 4. 18 H. 6. 10 E. 4.

30. Several may join in *Ex parte talis*. Thel. Dig. 32. lib. 2. cap. 12. f. 2. cites 8 E. 4. 16.

31. In appeal against three, if every one be outlawed, and every one has charter of pardon, they shall not join in *scire facias* to have it allowed, but shall have several *scire facias*'s. Br. Joinder in Action, pl. 84. cites 8 E. 4. 13.

32. All of one and the same blood may join in writ *de libertate prebanda* in favorem libertatis. Per Markham, & Laicon quod non negatur. Br. Joinder in Action, pl. 85. cites 8 E. 4. 16.

Thel. Dig. 32. lib. 2. cap. 12. f. 2. cites

S. C. & S. P. accordingly.

33. Two cannot join in action of *battery* done to them. Br. Joinder in Action, pl. 68. cites 12 E. 4. 6.

cites S. C. accordingly, and that so agrees Mich. 19 R. 2. Brief 926. — Ow. 106. Arg. cites 8 E. 4. 18. 18 H. 6. 10 E. 4. S. P. accordingly.

Thel. Dig. 32. lib. 2. cap. 12. f. 4.

34. If there are 2 tenants and one brings *replevin* upon a distress taken by the lord, the mesne cannot join to the plaintiff unless the other jointenant

*jointenant first joins to the plaintiff*; for the one alone does not hold of the mesne but both hold of the mesne. Br. Jointenants, pl. 35. cites 12 E. 4. 2.

35. Where it is by way of *defence* 2 may join although their *pleas be several*. Arg. Cro. E. 473. pl. 36. in case of Worsely v. Char-nock, cites 12 E. 4. 6.

36. If two jointenants have a bailiff, and one assigns auditors, both shall join in action of debt; for the assignment of one is the assignment of both. Br. Joinder in Action, pl. 87. cites 18 E. 4. 3.

37. Trespass by S. and D. of 50 cygnets taken, the defendant said as to 20 that the property, at the time of the trespass, was in S. alone *absque hoc* that the other any thing had, and as to 20 that the property, &c. was in the other at the time of the trespass, judgment of the writ, and as to 9 Not guilty, and as to the other one, pleaded custom of the county of Bucks, that of land adjoining to the land where; &c. And the pleas were held good to the writ, and *e contra* in bar. Br. Trespass, pl. 418. cites 2 R. 3. 15.

A. and B.  
grantees of  
the next a-  
voidance of  
a church.  
Before any  
avoidance

38. Two jointenants shall join in *Quare impedit* of an advow-son; for the thing is entire, and none of them shall have *Quare impedit* of the moiety of an advowson of a church, nor of the third or fourth part, but shall join, and therefore they ought to agree in presentment. Br. Joinder in Action, pl. 103. cites 5 H. 7. 8.

Under-lessee  
and his af-  
finee of part  
of the land  
being sued  
in the spi-  
ritual court

39. B. and 2 others sue for [are sued by] 3 *several libels* in the spiritual court, and they join in a *prohibition*. And by the court that is not good. But they ought to have had three several *prohibitions*. And therefore a consultation was granted. Noy 131. Anon. cites M. 26, 27 Eliz. C. B.

for *rythes* may join in a *prohibition*. Owen 13. Hill. 36 Eliz. B. R. William Bartne's case. *Prohibition* cannot be brought by 2 where the *grievances* are several. Cro. C. 102. pl. 3. Mich. 5 Car. B. R. Kadwallader v. Bryan.

It was said by the court that 2 may join in a *prohibition* though the *gravamen* be several; but they must sever in their declarations upon the attachment. Vent. 266. Mich. 22 Car. 2. B. R. per cur.

See (A. d)  
34 H. 6. 43.

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—And see  
34 H. 6. 43.  
at (Z. c.)

40. T. and R. acknowledged a *statute merchant*, and judgment was had upon it in C. B. and the *land of T. only was extended*, because the other had not any thing; And he brought error in B. R. and the judgment in C. B. was reversed. And the question was, if they both may join in the *scire facias* for to have restitution of that which they lost, and the mean profits; where in truth one of them had not lost any thing. But resolved by the court that they may join, and that the words of the restitution to T. only may be good enough, because he only had sustained the loss, and both were parties to the first judgment, and to the reversal of it; and by the restitution he that lost nothing shall recover nothing. Noy 130. Thompson & al'.

41. Defendant in *quare impedit* and the bishop may join in a writ of error. Cro. E. 65. pl. 11. Mich. 29 & 30 Eliz. B. R. The Bishop of Gloucester and Savacre's case.

42. Cause

42. *Cause of action being several, and not joint, they cannot join in the action; as in case of a fine levied by an infant and one of full age, they cannot join to reverse the fine for the infancy.* Cro. E. 115. pl. 15. Mich. 30 & 31 Eliz. B. R. Piggot v. Ruffel.

Le. 317. pl. 445. Piggot v. Harrington Mich. 30 & 31 Eliz. B. R.

seems to be S. C. and upon a writ of error brought by the infant alone, the writ was held good, and the fine reversed as to the infant only.

43. *The owner of the land let it to be sowed by halves, viz. he was to find half the seed, and three more were to manure the land, and find the other half of the seed. A stranger broke the close, and all 4 brought an action of trespass. Adjudged that this was no lease of the land, and therefore they could not all join in trespass Quare clausum fregit, &c.* Cro. E. 143. pl. 10. Trin. 31 Eliz. C. B. Hare & al'. v. Celey.

Le. 315. pl. 439. Hill 20 Eliz. C. B. Hare v. Okelie, S. C. adjudged that they could not join in trespass for

breaking of the close, and judgment against the plaintiff. — Goldsb. 77. pl. 9. Hare's case. S. C. held accordingly as to the clausum fregit.

44. *Principal and bail, where judgment is given against the principal, and another judgment against the bail, they cannot join in a writ of error; for these are 2 several judgments.* Jenk. 302. pl. 74. cites Hill. 11 Jac. Anon.

Hob. 72. pl. 85. S. P. held accordingly. Forest v. Sandland.

— Show. 8. S. P. accordingly, and cites S. C. Pasch. 1 W. & M. Evans v. Pettifer. — Comb. 108. S. C. and the writ of error was quashed; and held that Hob. 72. is good law.

45. *A. distrained the beasts of B. and C. whereupon D. the defendant, in consideration of 10l. paid to him by the plaintiffs, promised to procure the cattle to be re-delivered to them on or before such a day, and for not performing this promise B. and C. brought this action. It was moved in arrest of judgment, that the plaintiffs ought not to join in this action, because the promise on which it was founded was not one intire, but a several promise made to each of them; but by 3 J. contra Jerman, the consideration is intire, and cannot be divided, and here is no inconvenience in joining; but if one had brought the action alone, it might have been questionable.* Sty. 203. Hill. 1649. Vaux v. Draper.

46. *Case by A. and B. for that each of them had a mill in the same manor, which they have used \* [respectively] to repair, and time out of mind all the tenants of the manor, whereof the defendant is one, have and ought to grind all the grain spent in the houses at those 2 mills, or one of them; but that the defendant grinds grain spent in his house, at another mill, &c. Per Hale, & tot. cur. They may well join, for the damage is intire to both their mills. But Hale took exception to the declaration, that it is not well laid to grind at those 2 mills, or one of them; for it might be that all ought to be ground at one of them, and in such case the plaintiffs cannot join; but the declaration should have been, that all which is not ground at the one mill should be ground at the other. And another exception being taken by Twisden J. the plaintiff prayed a Nil capiat per billam, and had it.* 2 Lev. 27. Mich. 23 Car. 2. B. R. Litheby v. Coniton.

\* 2 Saund. 115. Coryton v. Litheby, S. C. held per tot. cur. that they may join; for though the interests are several, yet the damage is an intire joint damage to

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both, for which they

shall

shall have their joint action, or otherwise their damages will be recovered twice, if they bring their several actions. — Vent. 167. S. C. held accordingly. — 2 Keb. 631. pl. 42. 803. pl. 51. 822. pl. 35. 838. pl. 71. 850. pl. 100. S. C. and they may join.

47. Several men that have *several estates, and no relation the one to the other*, cannot join in making *prescription*, (as freeholders and copyholders of a manor for common;) for the prescription of the one does not concern the other. Vent. 388. Arg.

48. The father and son covenanted with a purchaser to sell lands, &c. and it was agreed between the parties, that the purchaser should pay so much of the purchase-money to the son. The action was brought in the name of both; and upon a demurrer to the declaration it was held ill, because the duty is vested in the son, and he alone ought to have brought the action; and judgment for the plaintiff. 3 Mod. 263. Mich. 1 W. & M. Tippet v. Hawkey.

49. In case the plaintiffs declared of a *custom* in the parish of C. for the parishioners yearly to elect two persons to be churchwardens there, and that they elected according to the said custom B. and C. but the defendant, *surrogate of the bishop*, refuses to admit and swear them into the said office; upon which they bring a *mandamus*, and he *falsely returns* a custom for the vicar to chuse one churchwarden, and that therefore he cannot admit both the said plaintiffs, but is ready to admit one of them. It was moved that they could not join; but adjudged per tot. cur. for the plaintiffs; for the *mandamus*, and the whole prosecution and charge thereof was joint; and this is no office of profit, nor is the action brought for that, but for the unjust return, by which they were put to the charge of the *mandamus*. 3 Lev. 362. Trin. 5 W. & M. C. B. Ward & al' v. Brampton.

3 Lev. 351.  
255. S. C.  
and judgment affirmed. —  
4 Mod. 176.  
S. C. and the  
defendant  
not plead-

50. In case for stopping a ship, by process out of the admiralty, all the proprietors of the goods ought to join; but where one only brought the action, and had judgment, the joint proprietorship not being pleaded in abatement, the judgment was affirmed in error. 1 Salk. 31. pl. 2. Pasch. 5 W. & M. in B. R. Child v. Sands.

ing this matter in abatement, and averring that the others were living at the time of the action brought, the plaintiff had his judgment. — Skin. 334. Sands v. Child, S. C. argued. Sed adjournatur. — Ibid. 361. S. C. and judgment affirmed. — Carth. 294. S. C. and judgment affirmed. — Comb. 255. S. C. and judgment affirmed.

Action for  
a false return  
to a mandamus  
was brought by  
a churchwardens,  
and moved  
in arrest of  
judgment  
that it could

51. Several inhabitants procured a *licence of a chapel for a conventicle*, which the *bishop's register* refuses to register according to 1 W. & M. and upon a *mandamus* to register it, made a *false return*. Several of the inhabitants joined in one action against him; and adjudged upon demurrer, after divers arguments, that it well lay per omnes conjunctim. 3 Lev. 363. Trin. 8 W. 3. The inhabitants of Hinley-Chapel in Lancashire v. the Register of the Bishop of Chester.

not be, because the fees of the one were not the fees of the other, but several. Cur' advisare vult. 12 Mod. 349. Pasch. 12 W. 3. Butler v. Rew. — 12 Mod. 371. Pasch. 14 W. 3. Butler and Lewin v. . . . seems to be S. C. and the exception weighing much with the court, the matter was compromised.

52. If a *legacy* be given to two, one cannot sue: So of a *residuum bonorum* to divers, they must all join; but when legacies are given to divers persons, each alone may sue for his own legacy; per the solicitor-general. 2 Chan. Cases, 124. Mich. 34 Car. 2: in case of *Havcock v. Haycock*.

52. If all the *mariners* of a ship join to sue the master in the admiralty, they may do it, and no prohibition lies; but if the master and seamen join in a suit against the owners for wages, a prohibition may issue on motion. 2 Show. 86. pl. 75. Hill. 31 & 32 Car. 2. B. R. Anon.

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53. A note made by one of a society to another of them, is a note to all except him that gives it. The same of debt on account stated, and they must all join. If there are 20 partners; and one of them covenants with all the rest, he is in that respect several from them all, and they shall all join against him. 7 Mod. 116. Mich. 1 Annæ, B. R. *Thimeblethorp v. Hardesty*.

54. Several inhabitants in a parish may appeal together to the sessions against a poor-rate for inequality. 12 Mod. 259, 260. pl. 14. Mich. 8 Ann. B. R. Per cur. in case of the *Queen v. St. Giles's Parish*.

**(Z. c) Where several must join.**

1. **W**HERE a man has several infants, and dies; where the custom is that the infants shall have a third part of the goods of the father, they shall not be compelled to join in action of detinue, nor in writ of *rationabili parte bonorum*. Br. Joinder in Action, pl. 93. cites 1 E. 2. & 34 E. 2. & Fitzh. Detinue 56 & 60. Thel. Dig. 26. lib. 2. cap. 2. f. 31. cites S. C.

2. If a man covenants with 20 to make the sea-banks of A. B. [&c.] and with every one of them, and after he does not do it, by which the land of two of them is surrounded *ad dampnum*, &c. those two may have action of covenant without the others, by the opinion of the court. Brooke makes a quære; for it seems that every one shall have action by himself. Br. Covenant, pl. 94. cites 6 E. 2. It. Kanc. A. B. and C. covenant with J. S. and W. R. & cum quolibet & cum qualibet eorum; all the 3 covenantors must

join. Adjudged on a writ of error brought in the Exchequer, and a former judgment reversed, because they did not join. 3 Le. 160. pl. 209. Hill. 29 Eliz. C. B. Beckwith's case.—2 Le. 47. pl. 60. Anon. but seems to be S. C. adjudged accordingly, notwithstanding this case of 6 E. 2. was strongly insisted upon.—Jenk. 262. pl. 63. cites 5 Rep. 18. b. *Slingsby's case*, S. C. and says that the case was: A. conveys a manor to 3 in fee, and covenants with them, & quolibet eorum, that he has conveyed a good estate to them. This is a joint estate, and therefore a joint covenant, and they ought to join in covenant before partition; for it is a covenant real, and goes with the estate; but after partition the said feoffees may have several actions of covenant: for it is a real covenant, and goes with the estate; and the word *quolibet* in this case helps them also after partition. Adjudged upon error in the Exchequer-chamber.

And if 3 manors had been conveyed to 3 persons severally with such a covenant, this had been several covenants, and not a joint covenant. Jenk. 262. pl. 63. Mich. 29 & 30 Eliz. in Cam. Scacc.

Grac. 19 2, and covenant with them, and either of them, that he was lawfully seised, &c. yet they cannot sue severally, because the interest is joint, and an interest cannot be granted jointly and severally. 5 Rep. 18. b. Mich. 29 & 30 Eliz. in Cam. Scacc. *Slingsby's case*.



3. In *covenant* the writ was brought by 2 chaplains where the indenture was made between the 2 chaplains, and one Hugh, of the one part, and the defendant of the other part, and it was held a good writ without naming Hugh, because the agreement was by the indenture, that the defendant ought to infeoff the chaplains only, &c. and Hugh was named for testimony only, and put his seal, and was not to have any profit. Thel. Dig. 32. lib. 2. cap. 12. f. 1. cites Hill. 19 E. 3. Variance 65.

And so it should have been if the one had released to the others. Ibid.—

4. Where *feoffment by deed with warranty* was made to 3 in fee, and the one of them surrenders to the two his estate, the opinion of the court was, that the two may maintain writ of *warrantia chartæ* without the 3d. Thel. Dig. 25. lib. 2. cap. 2. f. 12. cites Mich. 20 E. 3. 41.

But as to the surrender, it was held 22 H. 6. 51. that such surrender should be void, notwithstanding that he who surrendered had only an estate for his life. Ibid.

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5. *False claim made before justices of forest was traversed in B. R.* viz. it was of making a woodward of the wood of P. and to have windfalls there, and he who traversed made title to himself thereof, and that the judgment before the justices of the forest was *ad exheredationem* of him, and of all other commoners of S. Skip. said the grief is supposed as well to all the commoners as to himself; judgment of the writ; & non allocatur; but the writ awarded good. Br. Brief, pl. 156. cites 21 E. 3. 48.

6. In *detinue*, if 2 bail a deed to deliver to them, or to one of them, both shall have the action, and not the one alone; for if they should bring several actions, the court could not know to whom to deliver it; per Thirning; quod cur. concessit. Br. Bailment, pl. 4. cites 12 H. 4. 18.

7. *Four jointenants were, and 2 of them disseised the other 2, upon which an assise was brought in the names of all the 4 against the 2 disseisors, who were summoned and severed, and the 2 disseisees made their plaint of the moiety, and the writ was adjudged good.* Thel. Dig. 25. lib. 2. cap. 2. f. 11. cites 23 Ass. 9. and that so agrees Trin. 3 E. 4. 10. and 47 E. 3. 23.

8. If 2 jointenants are disseised by a stranger, and afterwards the one of them comes to the tenancy by purchase, and the other is put to his action, both of them ought to be named demandants notwithstanding that one be tenant, &c. Thel. Dig. 25. lib. 2. cap. 2. f. 11. says it was so held 23 Ass. 9. and says see 28 H. 6. 9.

9. If there are 3 brothers of land partible, and the one holds out the 3d, he alone may have assise of the 3d part of 20 acres of land without naming the 2d, for it may be that he has his land in quiet. Br. Joinder in Action, pl. 56. cites 23 Ass. 12.

10. *Assise of rent by E. the defendant said, that the plaintiff had nothing unless in common with J. S. daughter of A. sister of the plaintiff, who is alive, not named; judgment of the writ; and if, &c. nul tort; it was found that M. was seised in fee of the rent and died seised, and the land descended to A. and E. which A. had issue J. S. and died, and J. S. was within age, and E. took him in ward, and received the whole rent to his own use, and not to the use of J. S. nor* was



was any thing assigned to J. S. in allowance, nor the ancestor had no other land, and by award the writ was abated by the not naming of J. S. Quod nota; and so see the seisin of the one is the seisin of both; quod nota bene. Br. Joinder in Action, pl. 60. cites 36 Aff. 1.

11. If any of the tenants in ancient demesne be distrained for more services than they ought to make, there all the tenants in ancient demesne ought to join in monstraverunt, and if any be omitted the writ shall abate. Br. Joinder in Action, pl. 81. cites 39 E. 3. 7. See 49 E. 3. 22. at (Y. c) —Br. Monstraverunt, pl. 4. cites F. N. B. 14.

S. P. and says, that it shall be sued by all without naming any of them by the proper name, but homines, &c. de tali manerio de J. S. which is ancient demesne; but in the attachment thereupon he shall be named.

12. Where 2 jointenants of a fee simple lose by default, they shall join in writ of right; but if the one of them has only an estate for his life, and the other have the fee, the one shall have quod ei deforceat for his moiety, and the other a writ of right, and after they have recovered they may enter and hold in jointure as before, &c. Thel. Dig. 25. lib. 2. cap. 2. f. 14. cites Mich. 46 E. 3. 21. and that so agrees Mich. 19 H. 6. And so it shall be where the 2 are tenants for life. Thel. Dig. 26. lib. 2. cap. 2. f. 14. cites Trin. 3 E. 4. 10.

13. In præcipe quod reddat against 2, where in truth the one has nothing, if the demandant recovers by default after default against both, he who was tenant shall have the quod ei deforceat alone without the other. Thel. Dig. 27. lib. 2. cap. 2. f. 35. cites Pasch. 8 R. 2. Brief 931.

14. One jointenant without his companion may sue his purparty out of the bands of the king where all is seised into the king's hands. Thel. Dig. 26. lib. 2. cap. 2. f. 15. cites Trin. 2 H. 4. 23.

15. If goods are bailed to two, and the one has possession, and a stranger carries them away, yet both shall have action of trespass. Br. Joinder in Action, pl. 31. cites 7 H. 4. 43.

Detinue of two writings, the defendant prayed garnishment, and had it, and the garnishee came and said, that the writings were made to two, and delivered by the two into indifferent hands, and the one of them has brought the action alone; judgment of the writ; and per Thirn. and Cur. the action does not lie, though the garnishee cannot plead in abatement of the writ which the defendant has admitted good, yet because it appears, the writ shall abate, and they shall bring the action in common; quod curia concessit. Br. Detinue de biens, pl. 20. cites 12 H. 4. 18.

16. So where 2 are joint proprietors, and the one has possession, and a stranger carries them away; per Vampage; for otherwise it is a good plea that the property is in the plaintiff and in J. B. not named; judgment of the writ. Ibid.

17. If tenant in tail has issue 2 daughters, and discontinues and dies, or a man abates, they shall have one formedon, and shall join; but if tenant in tail dies seised, and his 2 daughters and heirs enter and discontinue, and each has issue and dies, there each issue shall have formedon of his moiety by himself. Br. Joinder in Action, pl. 33. cites 19 H. 6. 45.

18. So if 2 barons and femes seised in jure uxorum alien, and the barons die, there each of the femes shall have cui in vita by herself, Br. Joinder in Action, pl. 4. cites

34 H. 6. 12.  
S.P. accord-  
ingly by  
Davers.

self, and shall not join; note the diversity for the alienation of the one is not the alienation of the other. Br. Joinder in Action, pl. 33. cites 19 H. 6. 45.

19. Where two jointenants are, and the one of them leases that which to him belongs to one for term of years, and the lessee will not suffer the other jointenant to occupy, the assise ought to be brought in both their names, notwithstanding that the one has no cause of complaint, &c. Thel. Dig. 26. lib. 2. cap. 2. f. 16. cites Trin. 28 H. 6. 9. per Fortescue.

See Noy.  
130.  
Thomp-  
son's case  
at (Y. c)

20. If a man recovers in value against two, and takes execution against the one, yet both shall have attain, and shall join in attain. Br. Joinder in Action, pl. 4. cites 34 H. 6. 43. per Fortescue.

21. Jointenants ought to join in action of trespass of a close broken. Thel. Dig. 25. lib. 2. cap. 2. f. 10. cites 35 H. 6. 55. and Hill. 32 H. 6. 33. and of goods carried away. Pasch. 19 H. 6. fol. 65.

22. Where an obligation is made to an abbot and a secular person, and the secular person dies, the abbot and the executor of the secular person shall join in action; for the action shall not survive to the one for several capacities. Br. Joinder in Action, pl. 71. cites F. N. B. tit. Debt.

F. N. B. 49.  
(O)

23. Two prebendaries may be one parson of a church, and they shall join in juris utrum; quod nota, that they may have this action; for it is twice alleged there that they may have juris utrum. Br. Prebend. pl. 3. cites F. N. B. 49.

24. If two tenants in common join in a lease for life, rendring 2 s. and a pound of pepper, and a hawk, or a horse, there they shall join in assise of the hawk, &c. which is entire, and shall have 2 assises of the 2 s. and the pound of pepper, which are severable. Br. Reserva- tion, pl. 44. cites Littleton tit. Tenants in Common.

25. But of trespass in the soil they shall join in action, and in other such actions personal. Ibid.

26. And they shall join in action of debt for rent reserved by them upon their lease for years. Ibid.

27. And yet in avowry for the same rent, they ought to sever; for this is by reason of the reversion, which is several. Ibid.

28. Where 2 have a horse in common, and the one of the two sells the horse for 10l. they shall join in action of debt; for it shall be adjudged the contract of both. Thel. Dig. 26. lib. 2. cap. 2. f. 19. cites 18 E. 4. 3.

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29. A. exposed land to 3 to sow at halves for one crop. In an action against a stranger for spoiling the corn, they must all join, viz. A. and the 3 others. Cro. E. 143. pl. 10. Trin. 31 Eliz. C. B. Hare & al' v. Celley.

30. Bond to 3 to pay the money to one of them, all ought to join in the suit; for they are all as one obligee. Yelv. 177. Trin. 8 Jac. Rolls v. Yate.

31. It was said at the bar, and not gainsaid, if a man perjures himself against two, the one by himself cannot have an action upon the statute, but they ought to join; for he is not the only party grieved. Het. 73. Hill. 3 Car. C. B. Deakins's case.

32. Lu

32. In covenant the plaintiff declared upon an indenture made between A. of the first part, B. of the second, and C. of the third, in which quilibet eorum covenanted with each other respectively to raise a joint-stock of 6000l. and to buy brandies in partnership, and that none of them during the partnership, should trade in brandies upon his own account, &c. or in company with any other, but only upon the joint-account, &c. C. brought action against B. the defendant, and amongst other things assigned for breach, that B. the defendant had during the partnership traded for 200 tuns of brandy upon his own account, and not upon the joint-account. After judgment given for the plaintiff by default, it was objected that A. ought to be joined with C. in this action; for though the covenant, by the words of it, was joint and several between all the parties, yet the interest and cause of action is joint only; for upon every breach A. had an equal damage with C. and therefore he ought to be joined with the plaintiff in this action; upon its being moved again, the court was of opinion against the plaintiff, but no judgment was given; for the plaintiffs had leave to discontinue, and bring a new action. 1 Saund. 153. Trin. 20 Car. 2. Eccleston & Ux' v. Clipsham.

*In covenant between partners so far as the interest of the covenantees are joint and not several, they must join in action in case of breach; but where one of them has a several interest and cause of action for it, he may have action alone.*  
Saund. 155. Trin. 20 Car. 2. Eccleston v. Clipsham.

33. Where there are several residuary legatees, they must all join in an action; but where the share of each was left to the discretion of the executor, as he without compulsion at law should declare, and the executor had declared, and had paid all the legatees but one, yet he alone sued for an account in Chancery, without the others joining, and was relieved. 2 Ch. Cases, 198. Trin. 26 Car. 2. Gibbons v. Dawley.

34. A. covenanted with B. and C. that he would not make any agreement to farm the excise of beer in Cornwall without their consent. B. alone brought covenant against A. and assigned the breach, that A. made an agreement for farming the excise without his consent. The court held that here was no joint interest, but that each might maintain an action for his particular damages, or otherwise one of them might be remediless; for if one had consented to A.'s farming it, and had secretly received some recompence for it, it is not reasonable that the other, who never consented, should lose his remedy; and therefore the plaintiff had judgment. 2 Mod. 82. Pasch. 28 Car. 2. C. B. Wilkinson v. Loyd.

*Covenant on articles of agreement between several fidlers, that they would not play, &c. afunder, unless on my lord mayor's day, &c. and they were bound*

in 20 l. each to the other jointly and severally, and one only brings covenant, and assigns the breach, that the defendant played ad quendam tabernam, &c. judgment for the defendant; for they ought all to have joined, the interest being joint, and it is repugnant and contradictory for 4 persons to bind themselves the one to the other, jointly and severally. Comb. 115. Trin. 1 W. & M. in B. R. Spencer v. Durant. — Show. 8. S. C. accordingly.

See Prero-  
gative  
(Q. 3)

(A. d) Where the King and a Subject shall join in a Writ.

1. **A** Suit was maintained in the Exchequer by *the king and the mayor, bailiffs and commonalty of Southampton, who held the vill and port in fee-farm of the king, against certain persons who had taken certain customs, and disturbed the corporation from taking custom, &c.* Thel. Dig. 28. cap. 4. f. 1. cites Trin. 2 E. 3. 51.

2. Where *the king had given the ward of a chapel to D. against whom A. brought assise, and the plaintiff was of a house, land, and rent, &c. and pending the assise D. resigned to the king, and the king gave it to one O. and after the plaintiff in the assise recovered, and O. was ousted, &c. upon which a writ of error was maintained by the king and O. jointly, &c.* Thel. Dig. 28. lib. 2. cap. 2. f. 2. cites 15 Ass. 8.

3. A writ was maintained for the *king and the guardian of the hospital of St. Leonard of York, which was of the patronage of the king, against certain persons who had withdrawn the alms of the said hospital; and it is said there, that the king and the clerk who is disturbed by proviso, should join in præmunire by the new statute.* Thel. Dig. 28. lib. 2. cap. 4. f. 3. cites Mich. 25 E. 3. 50.

But where  
an obligation  
is made to  
2, and the  
one is out-  
lawed, the  
king alone shall have action for the whole without the other. Thel. Dig. 29. lib. 2. cap. 4. (bis) f. 6. cites Mich. 19 H. 6. 47.

4. Where an *obligation is made to the king and to his customers, they shall join with him in action.* Thel. Dig. 28. lib. 2. cap. 4. (bis) f. 6. cites it as adjudged 21 R. 2. Joinder in Action 3.

(B. d) Against whom. Where Action may be brought against several for the same Fact or Thing.

1. **COVENANT** was brought by *the lessee against the lessor, because the lessor, after the lease, made feoffment to one who ousted the lessee, and awarded that it lies well; quod nota; and yet the lessee might have had re-entry; or have had quare ejecit infra terminum by the statute; and yet this does not toll the action of covenant, which is given by the common law, notwithstanding that quare ejecit infra terminum is given by the statute; but Brooke makes a quære if he cannot recover against the lessor by the one writ, and against the feoffee by the other writ; for he may recover by two quare impedit of one avoidance.* Br. Covenant, pl. 7. cites 46 E. 3. 4.

2. A. demanded 5 l. of B. and C. as monies expended for them pro diversis negotiis; and upon an arbitration B. and C. were awarded to pay 4 l. viz. B. to pay 40 s. and C. 40 s. A several ac-  
tion

tion may be brought against B. or C. For the *viz.* makes it as several arbitrements for both; and judgment for the plaintiff. Cro. E. 422. pl. 18. Mich. 37 & 38 Eliz. B. R. Sower v. Bradfield.

3. If *A. takes* beasts by command of B. the replevin may be brought against both, or against the commander only. Mich. 8 Ja. B. per curiam. See Replevin (D.)

4. If one cuts my corn, and another carries it away, action lies against any of them. Cited by Jones J. Mar. 22. in pl. 49 Pasch. 15 Car. to have been adjudged in B. R.

5. Debt upon an obligation against two, by several præcipes, and demanded against each the whole, and judgment of the writ was demanded, because he ought to demand the whole against the one only, or against both by one præcipe, by which the writ was abated for contrariety, anno 14 H. 4. 19. But the plaintiff elected his execution at his peril; for he shall have but one execution against the one of them only. Br. Dette, pl. 59. cites 7 H. 4. 6.

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Upon a bond you cannot sue both jointly and severally, but upon a recogni-

once you may; per Holt Ch. J. 6 Mod. 197. Trin. 3 Annæ, in case of Fanshaw v. Morison.

**(C. d) Where several may be joined.**

1. **A** Man may maintain one writ against several of *champerty* for several *champerties*. Thel. Dig. 49. lib. 5. cap. 21. f. 1. cites Mich. 31 H. 6. 9.

Br. Joinder in Action, pl. 100. cites 31 H. 6. 1. S. P. 47 E. 3. 17.

where the offence is several, concerning one and the same principal matter.—See at (Y. c)

2. Writ of *dower* was brought against tenant by elegit, and him in reversion. Thel. Dig. 47. lib. 5. cap. 11. f. 1. cites Mich. 2 E. 3. 42. and says it is held that it may lie. Hill. 1 E. 3. 3.

3. A man may well maintain one writ against the mortgagee and the mortgagor jointly, notwithstanding that the mortgagor be not tenant, for doubt of the redemption pending the writ. Thel. Dig. 46. lib. 5. cap. 8. f. 1. cites Pasch. 6 E. 3. 252. Trin. 11 E. 3. Brief 474. Trin. 26 E. 3. 62. Trin. 41 E. 3. 16. Pasch. 7 H. 6. 19. Trin. 32 E. 3. Per quæ servitia 9.

Br. Brief, pl. 159. cites 7. H. 6. 16. 17. S. P. accordingly; for there is privity between them.

4. *Mortdancestor* may be by several summons against several persons. Br. Several Præcipe, pl. 11. cites 10 Ass. 3.

5 & 6. And where 2 were obliged & uterque eorum in solido, one writ was maintained against one of them alone. Thel. Dig. 48. lib. 5. cap. 18. (bis) f. 2. cites Pasch. 10 E. 3. 502.

7. It was said that writ of *right of advowson* lies against tenants in common of the advowson jointly. Thel. Dig. 44. lib. 5. cap. 3. f. 4. cites Trin. 17 E. 3. 38.

8. A man cannot maintain one writ jointly against the heir and

against the executors. Thel. Dig. 47. lib. 5. cap. 12. f. 2. cites Hill. 18 E. 3. 4.

If a man gives land to two men, and so the heirs of their bodies, there is jointure for

9. If 2 parceners are coheirs by fine executory, and the one and a stranger enters, the other shall have scire facias to execute the fine against the stranger of the moiety; for the other sister is in in the other moiety by title, and so it shall not be against both. Br. Joinder in Action, pl. 96. cites 24 E. 3. 28.

term of life, and several inheritances; and if each have issue and die, and the issue of the one and a stranger enters into the whole land, the issue of the other shall have his action of the moiety against the stranger only; for the other issue is in, in his moiety by title, and the stranger has the other moiety by tort. Br. Demand, pl. 48. cites 24 E. 3. 29.

See 9 E. 4. 14. at (C. d.)

10. Writ brought against one parcener and one who has the estate of the tenant by the curtesy, who was baron to her sister, shall be good, by the opinion of all the court. Thel. Dig. 44. lib. 5. cap. 3. f. 2. cites Trin. 24 E. 3. 29 & 31 E. 3. Several Tenancy 21.

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11. One joint scire facias was maintained against several tenants out of a fine, without several garnishment. Thel. Dig. 108. lib. 10. cap. 16. f. 7. cites Hill. 24 E. 3. 23.

Ibid. 113. lib. 10. cap.

23. f. 6. cites 8 C. and 30 E. 3. 32.

12. One and the same writ of *Quid juris clamat* was maintained against several tenants for life, and not accepted. Br. Several Tenancy, pl. 23. cites 24 E. 3. 37.

13. In assise brought against a feme, it was found that she had entered claiming to her use, and to the use of her sister and co-heir, where their entry was not lawful, &c. The writ was adjudged good, notwithstanding that the other sister was not named, &c. For a man shall not be co-heir to a disseisin. Thel. Dig. 44. lib. 5. cap. 1. f. 4. cites 27 Aff. 68.

14. Scire facias out of a recovery in writ of debt may be brought against the executors alone without naming the heir or tertenants. Thel. Dig. 47. lib. 5. cap. 12. f. 7. cites Trin. 27 E. 2. 80.

A præcipe does not lie against two tenants in common,

but there shall be several writs of moieties. Br. Joinder in Action, pl. 83. cites 8 E. 4. 10.

15. A scire facias brought against tenants in common was adjudged good. Thel. Dig. 44. lib. 5. cap. 3. f. 2. cites Hill. 28 E. 3. 90.

16. One writ upon the statute of labourers was maintained against the servant for departing out of service and the master who had retained him. Thel. Dig. 49. lib. 5. cap. 20. f. 1. cites Pasch. 29 E. 3. 35. and Pasch. 9 H. 6. 7. and Mich. 28 E. 3. 97.

17. Where 2 were obliged jointly, after the death of both a writ of debt was brought against the executors of the survivor of them alone. And it was said by Thorp, that after the death of one of them the writ may be brought against the survivor alone, or against him, and the executors of the other jointly. Thel. Dig. 47. lib. 5. cap. 12. f. 6. cites Pasch. 31 E. 3. Executors 82.

18. One writ of attachment upon a prohibition was maintained against 2 by several *pone per vad.* &c. Thel. Dig. 107. lib. 10. cap. 16. f. 5. cites Hill. 33 E. 3. Brief 913.

19. Decies



19. *Decies tantum* was brought against jurors, and *supposed that J. and W. received such a sum, &c.* and the defendant demanded judgment of the writ, because the receipt of the one is not the receipt of the other; & non allocatur. Br. Joinder in Action, pl. 5. cites 40 E. 3. 33.

20. Action upon *the statute of labourers* was brought against two, because he *retained* them in the office of carvers *for a year, and they departed*; and because the retainer nor departure of the one is not the retainer nor departure of the other, therefore the writ was abated by exception of the party. Br. Joinder in Action, pl. 6. cites 40 E. 3. 35.

Br. Joinder in Action, pl. 41. cites 39 E. 3. 7. S. P. and that there ought to be several actions.——

Thel. Dig. 49. lib. 5. cap. 20. cites S. C.——F. N. B. 167. (C) in the new notes there (a) cites 39 E. 3. 6. S. P.——S. P. Br. Joinder in Action, pl. 16. cites 47 E. 3. 6.

21. *And yet contrary in trespasss*, and it is found that the one did part of the trespass by himself, and the other the rest by himself, the plaintiff shall recover; for there the writ does not appear ill in itself, and yet contrary here; Note the diversity. Br. Joinder in Action, pl. 6. cites 40 E. 3. 35.

But in trespasss against two, if the one is attainted of the trespasss, and the other acquiesced, the plaintiff shall recover against the one, and shall be amerced against the other; for there the writ might have been true. Br. Joinder in Action, pl. 15. cites 47 E. 3. 16.

Where the trespasses are severally done by two men several actions shall be brought, but contra of joint trespasses done by several. Br. Joinder in Action, pl. 47. cites 36 H. 6. 27. 29.

22. In one and the same writ the *one præcipe* was against *J. W. and Rich of 4 acres of land, another against J. W. alone of 4 acres of land, and the 3d against Rich alone of 4 acres of land*, and held that all the writ shall abate, if they are the same persons and the same land. Thel. Dig. 107. lib. 10. cap. 16. f. 4. cites Mich. 41 E. 3. Brief 544.

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23. Several tenants may be joined in one and the same writ of *per quæ servitia*. Br. Joinder in Action, pl. 95. cites 43 E. 3. 7.

24. In trespasss against a corporation and *J. N.* the said *J. N.* pleaded to the writ because it was brought against both where it should be by several writs; for against one lies *capias* and *exigent*, and against the corporation only *distringas*, but it was not adjudged. Br. Brief, pl. 71. cites 45 E. 3. 2.

25. *Where action is to be sued against 2 tenants in common a man shall have several actions.* Br. Tenant in Common, pl. 4. cites 48 E. 3. 16, 17.

26. If two abbots or priors *have ward and do waste*, one and the same writ shall lie against both without suing several writs, as admitted clearly in a writ of waste. Br. Joinder in Action, pl. 18. cites 49 E. 3. 25.

27. It was adjudged, that one writ upon the *case* does not lie against several for *not doing suit at a court* which they ought severally to do. Thel. Dig. 48. lib. 5. cap. 17. f. 4. cites Hill. 7 H. 4. 9.

Ibid. cap. 18. (bis) f. 4. cites S. C.—Br. Action sur

le Case, pl. 33. cites S. C. & S. P. accordingly, and because the act of the one is not the act of the other, the writ was abated.——Br. Joinder in Action, pl. 20. cites S. C. and because the nonfeasance of the one is not the act of the other, they ought not to be joined, and the writ was abated.

Br. Replevin, pl. 15. cites S. C. & S. P. accordingly.

28. *Replevin against 4, two justified for execution upon recovery as bailiffs, &c. and the third came in aid, &c. and this to the taking of two beasts, where the replevin was of four beasts, and the fourth justified the taking of the other two residue for rent arrear to himself by reason of tenure; and so see that a man may join several in replevin who distrained several beasts by several titles, and yet well as in trespass where they justify severally; Quod nota.* Br. Joinder, pl. 22. cites 7 H. 4. 27.

29. A man may have one and the same writ of *scire facias* against several tenants by words of several summons or garnishment, as *præcipe quod reddat* may be by several summons. Br. Several *Præcipe*, pl. 6. cites 11 H. 4. 15.

30. In *scire facias* it was agreed, that a man may have *præcipe quod reddat*, against the lord and the villein, for doubt of entry of the lord; for *between them is privity*. Br. Brief, pl. 159. cites 7 H. 6. 16. 17.

31. But a man shall not have writ against the disseisor and the disseisee, for *there wants privity, and the one estate does not depend upon the other, as above; Note the Diversity.* Ibid.

32. A man may have one joint writ against the bailiff or steward, and against the party also, for holding plea and suing plea in court baron of the sum of 40s. Thel. Dig. 48. lib. 5. cap. 17. s. 3. cites Hill. 19 H. 6. 54.

33. Bill of disceit by L. against P. and W. Attorney, because P. was deputy of the sheriff of D. to put writs, served by the sheriff, into C. B. and the defendants embezzled a writ of *habeas corpora* in a plea of land between L. and D. It was pleaded in abatement of the bill, that P. was deputy, and that W. the attorney had nothing to do, and therefore ought to have several bills; & non allocatur. Br. Bille, pl. 9. cites 19 H. 6. 29. 50 & 72.

34. And there it is agreed, that if one does a disceit or trespass by excitation of another, yet the suit lies against both; Quod nota; and shall give the matter in evidence as it seems; for there is no accessory in trespass. Ibid.

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34\*. It was agreed, that if 4 beat my father, and the one strikes him, by which he dies, yet an appeal lies against all. Br. Joinder in Action, pl. 100. cites 31 H. 6. 1.

35. So writ of \* *premunire* lies against all who offend severally, concerning one and the same principal matter. Br. Joinder in Action, pl. 100. cites 31 H. 6. 1.

36. And one and the same writ of attachment upon prohibition, lies against several likewise, and yet the act of the one is not the act of the other. Ibid.

37. Where one maintains generally, and another specially, as by giving of 6s. to a juror, several actions shall be brought of this matter; per cur. except Needham. Br. Joinder in Action, pl. 47. cites 36 H. 6. 27. 29.

\* See Pasch. 18 H. 6. 6. at (Y. c) See 34 H. 6. 43. at (X. c) See 14 H. 6. at (Z. c) maintenance against 2, the one pleaded Not

Guilty, and the other justified as for his servant; and exception was taken that *special maintenance and general maintenance* cannot be joined in one and the same writ; sed non allocatur. Br. Joinder in Action, pl. 100. cites 31 H. 6. 1.—Thel. Dig. 49. lib. 5. cap. 21. s. 1. cites 31 H. 6. 9. that a man may maintain one writ of maintenance against several for several maintenances; but says the contrary is held for clear law 36 H. 6. 30.

38. But

38. But one and the same *decies tantum* may be brought against all the jurors of one and the same pannel who took money; for they all give but one verdict, and are but one sole jury. Br. Joinder in Action, pl. 47. cites 36 H. 6. 27. 29.

S. P. Br. Joinder, in pl. 100. cites 31 H. 6. 1.—  
S. P. Ibid.

pl. 108. cites 21 H. 6. 22.—S. P. for it is founded upon one and the same record. Br. Joinder in Action, pl. 66. cites 8 E. 4. 24.—Thel. Dig. 49. lib. 5. cap. 21. f. 1. cites Mlch. 31 H. 6. 9. accordingly, and that the same was agreed accordingly \* Trin. 40 [E.] 3, 33.

\* See pl. 19.

39. And if two conspire, and the one only gives money, yet joint action lies against them both, and not several actions; for the agreement or communication only is the conspiracy; but in divers of those cases the damages shall be severed. Ibid. [36 H. 6. 30. 2.]

40. If an abbot and a layman disseise J. S. and make a feoffment, and take the profits, and the layman after is made a monk in the same abbey, there the action shall not lie against the abbot but for the moiety; for the abbot and the secular were not jointly seised, but by moieties; quod nota. Br. Parnor, pl. 15. cites 39 H. 6. 44.

41. If 2 disseise a man, and make a feoffment, and the one alone takes the profits of the whole to the use of him, and the other, action lies against both. Br. Parnor, pl. 15. cites 39 H. 6. 44.

But where two disseisors are, and make a feoffment, and

the one takes the profits [to his own use,] the action lies against him alone of the whole. Br. Parnor de Profits, pl. 21. cites 5 E. 4. 1. 2.

But if 2 feoffees of the disseisor make a feoffment, and the one takes the profits, the action shall be brought against both as tenants of the franktenement. Br. Parnor de Profits, pl. 21. cites 5 E. 4. 1. 2.

But if all take the profits, action is maintainable against them as parnors of the profits. Br. Parnor de Profits, pl. 21. cites 5 E. 4. 1. 2.

42. Action upon the statute of liveries, supposing that they received certain liveries of cloth of one J. W. and counted that every one received a gown, &c. Catesby demanded judgment of the writ, for the receipt of the one is not the receipt of the other; to which Pigot agreed. But per Choke & Needham, the writ is good; for it is in nature of several præcipes. Quære. Br. Joinder in Action, pl. 66. cites 8 E. 4. 24.

R. C. brought action upon the statute of giving liveries or badges, contra formam statuti, and counted that

the defendant gave liveries to several named in the writ, and exception was taken to the writ, because the tort of the one was not the tort of the other, and the writ awarded good, and well; for it was against the donor for giving to several. Br. Joinder in Action, pl. 27. cites 11 H. 4. 67.—Thel. Dig. 49. lib. 5. cap. 21. f. 3. cites Pasch. 11 H. 4. 65. and Mich. 8 E. 4. 22.

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But if it had been against several parnors of liveries, it seems that there should have been several actions. Note the diversity; for several torts by one and the same man may be in one and the same writ. Ibid.

44. In detinue of charters the defendant said that they were delivered to him by the plaintiff, and another who was dead, and had not made executors, and prayed garnishment against his heir and the ordinary, and had it. Thel. Dig. 47. lib. 5. cap. 12. f. 2. cites Hill. 14 E. 4. 1.

45. If writ of false judgment be brought against the suitors and the steward of a court-baron, the writ shall abate, because the steward

steward is named; per Vavisor. *Quære how this is intended*; for the writ is not brought against the suitors, but is directed to the sheriff that he shall record the plea, and send it into bank such a day, and summons the party to be there this day, to answer to the matter. Br. Joinder in Action, pl. 102. cites 1 E. 5. 3.

46. Where 2 are obliged & *uterque in solido*, one writ may be brought jointly against them, or one writ by several præcipes, or 2 several writs at the same time, &c. Thel. Dig. 48. lib. 5. cap. 18. (bis) f. 1. cites Mich. 46 E. 3. 29. But says the contrary was adjudged Mich. 7 H. 4. 6. and that the contrary is law also; for where five are obliged, and each in solido, writ does not lie against three of them by one præcipe, &c. and cites Pasch. 12 H. 4. 21. and that so agrees Pasch. 27 H. 8. 6. For one writ, and by one præcipe, ought to be against all, or several against each, and that so agrees Hill. 10 H. 7. 16.

47. Where a man is bound who has land by his father and by his mother, and dies without issue, the obligee shall have several actions against the heirs, and not joint action; and if he recovers against the one, execution shall cease till he has recovered against the other; for the one shall not be charged of all, for they are in as several heirs. Br. Joinder in Action, pl. 119. cites 11 H. 7. 12.

48. And per Fineux, against the heirs in gavelkind, joint action of debt lies upon the obligation of their father; for they are one heir. Ibid.

So where  
it was  
brought  
against two  
tenants in  
common, and  
it appeared

49. A. and B. were lessees of lands, and did not set out their tithes. Debt was brought upon the statute against A. The action does not lie. But here it was found that A. only occupied the land, and therefore the action well lies. Het. 121. 122. Mich. 8 Car. Coles v. Wilkes.

that one had set out the tithes, and the other carried them away; it was adjudged that the action lies only against him who carried them away. Hutt. 12. cites Mich. 8 Jac. Gerard's case.

50. If 2 lessees make partition, the lessor may have one action against them. Cro. J. 411. Mich. 14 Jac. in case of Ipswich bailiffs, &c. v. Martin & Parker.

3 Bulst.  
211. S. C.  
and the  
court clear  
of opinion,  
that the ac-  
tion of debt  
was well  
brought,

51. Two jointenants of a term, one assigns his interest to J. S. and the other dies and leaves M. executor, action may be brought against the assignee and the executor jointly for rent due afterwards; for the act of lessee shall not divide the action of the lessor. Cro. J. 111. pl. 11. Mich. 14 Jac. B. R. Ipswich Bailiffs, &c. v. Martin and Parker.

and judgment for the plaintiff.—Roll. Rep. 404. pl. 33. S. C. adjournatur.

W. the plaintiff made a lease for years to A. and B. rendering rent; B. assigned his moiety to C.—W. brought his action against A. and C. jointly for the rent, and had a verdict. It was moved in arrest of judgment, that though lessor has election to sue the lessee alone for the whole rent, or to have several actions against the lessee and assignee, yet he cannot join them both in one action, because the one is charged upon the contract, which continues notwithstanding the assignment, and the other is charged by reason of the occupation of the lands, and not upon the contract, there being none between him and the lessor, so that these are actions of several natures; but adjudged by 3 justices, contra Chamberlaine J. that the action lies jointly against one lessee and assignee, but he may have one action against both the lessees notwithstanding the assignment. Palm. 283, 284. Pasch. 20 Jac. B. R. Waldron v. Vicars & al.

Or, if the lessor will, he may bring debt against the assignee for a moiety of the rent, for the assignee having the intire estate in the moiety of the land, has *privity of estate sufficient to be so charged*; and judgment for the plaintiff. 2 Lev. 231. Mich. 30 Car. 2. B. R. Gamman v. Vernon.—S. C. 2 Jo. 104. resolved per tot. cur. that the action well lies.

52. *Case, &c. against 2 defendants for speaking scandalous words of the plaintiff.* Upon Not Guilty pleaded he had a verdict against both, but resolved, that the action will not lie against 2 defendants jointly, for several causes cannot produce a joint action, and therefore judgment was arrested. Palm. 313. Mich. 20 Jac. Chamblaine v. Wilmore.

53. *Case against 2 for procuring the plaintiff to be indicted for a common barretor.* It was moved in error, that the action lies not against 2, for that the procurement of one is not the procurement of the other; but the court was of opinion that the action lies against both. Lat. 262. Mich. 3 Car. Pencavin v. Trapping.

54. *One action cannot be brought against A. for an assault and battery of the plaintiff, and against B. for taking away his goods, because the trespasses are of several natures, and against several persons, and the parties cannot plead to such a declaration;* Per Roll Ch. J. this being assigned for error. Sty. 153. Mich. 24 Car. Cutworth's case.

55. *If several tenants claim under one person by one title, and the plaintiff hath but one [title] against them, they all may be joined in one action; but not so where he hath several [titles.]* Keb. 238. pl. 72. Hill. 13 Car. 2. B. R. (Ld.) Clare's case.

56. *An executor cannot be jointly sued with another, because he is charged De bonis testatoris, and the other De bonis propriis.* 2 Lev. 228. Trin. 30 Car. 2. B. R. in case of Hall v. Huffam.

S. C. cited accordingly. Carth. 171.

### (D. d) Where several must be joined.

1. **A** Man ought to sue several writs of præcipe quod reddat against tenants in common who are in by several titles, otherwise they shall abate. Thel. Dig. 44. lib. 5. cap. 3. f. 1. cites Mich. 6 E. 3. 283. and that so agrees Trin. 18 E. 3. 23. and Pasch. 42 E. 3. 17. and Trin. 48 E. 3. 17. and Mich. 12 H. 7. 1. Trin. 8 E. 3. 418. 5 E. 3. 179. and 17 E. 3. 24. 52. and 53.

2. *An obligation made which binds the heir ought to be sued jointly against the heirs male in gavelkind and against the heir at common law.* Thel. Dig. 44. lib. 5. cap. 1. f. 10. cites Mich. 11 E. 3. Dett. 7.

Where an obligee [an obligor] who has land by descent of

the part of the father, and also of the part of the mother, dies without issue of his body, several writs shall be brought against the several heirs, and not jointly, &c. but one writ shall be brought against all the heirs in gavelkind. Thel. Dig. 47. lib. 5. cap. 14. f. 1. cites Hill. 11 H. 7. 12.

3. *Where a fine is levied of lands in ancient demesne, by which fine divers remainders are intailed, it suffices to bring writ of deceit to annul this fine against the tenant of the land only without naming those in remainder.* Thel. Dig. 48. lib. 5. cap. 17. f. 2. cites Trin. 26 E. 3. 65.

4. *Parceners*



Thel. Dig.  
44. lib. 5.  
cap. 1. f. 6.  
says it ap-  
pears, as it  
seems by

4. *Parceners* shall be jointly sued always, notwithstanding that they are *in by diverse and several descents* before partition. Thel. Dig. 44. lib. 5. cap. 1. f. 7. cites Mich. 37 H. 6. 9. and Trin. 9 E. 4. 14. Pasch. 42 E. 3. 17.

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the opinion of 9 H. 6. 5. that writ of formedon may well lie against one parcener without naming the other after partition made, notwithstanding that he who is named was within age at the time of the partition, and yet is, &c.

When *coparceners* are *in by one descent*, if the one has issue and dies, and the other has issue and dies, and their issue enter, yet they shall be in as parceners, and writ of partitione faciend' lies against them; therefore he who brings *præcipe quod reddat* shall have it against them by one joint *præcipe*. Br. Joinder in Action, pl. 43. cites 39 H. 6. 8.

But contra where they are *in by several titles, or by partition*. Ibid.

But where they are to demand they shall have several actions, and yet when they recover they are in coparcenary as before, and so was the opinion of the court, that where they are in by coparcenary not parted, though it be by diverse descents, yet joint *præcipe* lies. Ibid.

*Præcipe quod reddat* shall be brought against 2 coparceners jointly. Br. Joinder in Action, pl. 40. cites 9 E. 4. 14.

5. Detinue shall not be brought *against an abbot and monk, but against a monk only*; *quod nota*. Br. Detinue de biens, pl. 15. cites 2 H. 4. 21.

Thel. Dig.  
48. lib. 5.  
cap. 18. (bis)  
f. 3. cites  
S.C. & P.

6. A man bailed goods to two, and the one kept the goods, and he brought detinue against him alone, and the other pleaded it to the writ that the bailment was to him and another in full life, and the writ abated; for both cannot keep the goods, but Thirn was in a contrary opinion. Br. Detinue de biens, pl. 16. cites 7 H. 4. 6.

Br. Dett. pl.  
69. cites  
S.C. ———  
Debt against  
3 by joint

7. Where 4 are bound by obligation *conjunctim & divisim*, a man shall not have debt upon it against 2, but against all, or against one alone. Br. Obligation, pl. 24. cites 12 H. 4. 21.

*præcipe*, and *process* issued till the one was outlawed and got pardon, and demanded judgment of the writ, inasmuch as 5 were bound by obligation and 2 are omitted; Norton said, the 5 are bound, and every one in the whole, by which the writ was abated. Brooke says the reason seems to be inasmuch as all ought to be sued if he will have joint *præcipe*, and every one by himself may be sued by several *præcipe*. Br. Several *Præcipe*, pl. 7. cites 12 H. 4. 18.

Br. Obliga-  
tion, pl. 26.  
cites 14 H.  
4. 30. 33.  
S.C. & S.P.  
and that the  
same law is  
of a monk bound with another person.

8. In debt, if *A. and a feme covert* are bound in 10 l. or *A. an infant*, the writ is well brought against *A.* leaving out the feme and the infant, and if it be pleaded to the writ the other shall maintain his writ by shewing that the one was a feme covert, or an infant at the time, &c. Br. Dette, pl. 205. cites 14 H. 4. 32.

Debt upon an obligation by the abbot of D. which obligation was to him and to J. N. and he said that J. N. was his commoign at the time, &c. and therefore well; per cur. For there is a diversity where an obligation appears void, and where not; for where an infant and a man of full age are bound, or a feme covert by a strange name, there the action shall be brought against both, and they shall have advantage by way of plea of the non-age, coverture, and profession, but where she is named feme covert, or commoign in the obligation, there it is otherwise; For in the first case the infant may admit the obligation, and so may the feme after the death of her husband, and the commoign after his disavowment. Br. Dette, pl. 190. cites 32 H. 6. 30.

9. It was adjudged that writ of *mesne* ought to be brought against all the parceners lords before partition, but otherwise it is after partition. Thel. Dig. 44. lib. 5. cap. 1. f. 5. cites Pasch. 3 H. 6. 43.

Fitzh. Ad-  
measure-  
ment, pl. 1.

10. In *admeasurement of pasture*, Ellerker said J. N. is seised of 20 acres of land to which he has common there, and is not named, judgment



judgment of the writ, & non allocatur. Br. Joinder in Action, cites S. C. and the defendant was  
 pl. 32. cites 8 H. 6. 26.  
 awarded to answer. *For in monstraverunt*, all the tenants shall be named by way of making plaint, but here none shall be named as defendant but he who did the tort, and yet in action brought against the one all the tenants shall be admeasured.

11. It was held that if a man *recovers* in writ of *trespass* against two or several, and *does not sue execution*, and be to bring a new writ for the same trespass, he ought to name all those against whom he had recovered before. But it was agreed there that it is no plea to say that the trespass was done by the defendants and others not named, &c. without pleading release made to one of them, or something to that purpose. Thel. Dig. 48. lib. 5. cap. 18. f. 2. cites Mich. 20 H. 6. 12.

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12. And where 2 coparceners are, and *the one takes baron*, and *has issue and dies*, *præcipe quod reddat* shall be brought against the other, and the *tenant by the curtesy*; for they continue the estate by coparceny. Br. Joinder in Action, pl. 40. cites 9 E. 4. 14.

13. Writ of *debt* brought *upon a contract* was abated because another was party to the contract not named. Thel. Dig. 48. lib. 5. cap. 18. (bis) f. 4. cites Trin. 9 E. 4. 25. and Mich. 20 H. 6. 12.

14. In trespass for *entring his house and carrying away his goods*; the defendant *pleaded that the trespass was done by him and J. S. and that the plaintiff had brought his action against J. S. and recovered against him, and had execution and is satisfied*. Wray conceived it reasonable that this was a discharge; but Gawdy contra; for the trespass is always in itself several. Clench said, *If one commands three to do a trespass, who do it, and a recovery is had against him, and he being in execution satisfies the plaintiff*; this discharges the others; for the commander was the principal trespasser, and the others did it only as his servants, which Gawdy seemed to agree. Et adjornatur. Cro. E. 30. pl. 3. Trin. 26 Eliz. B. R. Morton's case.

15. *Two were bound in a bond, & quilibet eorum conjunctim*. An action is not maintainable against one alone by reason of the word *conjunctim*. Goldsb. 83. pl. 3. Pasch. 30 Eliz. Wrightman v. Chartman.

If covenant be with several *conjunctim* & *divisim*, if the interest

upon which the covenant is founded or dependent be joint, the covenant is also joint; but if *the interest be several* the covenant is several. Per cur. Mo. 849. pl. 1154. Pasch. 14 Jac. B. R. Show. 8. Spencer v. Durant S. P.

Covenant in a charter party was between A. of the one part, and B. and C. of the other part, and *quemlibet eorum* an action brought by A. against B. only was held good; for it being between them, and *quemlibet eorum* is joint and several of every part. 2 Lev. 56. Trin. 24 Car. 2. B. R. Bolton v. Lee.

16. *Assumpsit* by three, one dies the survivors shall be charged, but if they are alive the action shall be brought against them all. Noy. 135. Breereton & Ux. v. . . . .

17. A. the master of a ship, by charter-party indented, *covenanted with B. and C. to go a voyage with goods to Cales*, and B. and C. *jointly and severally covenanted with A. that if the ship went the intended*

Palm. 397. S. C. and Lat. seems to be taken

from it, only Palm. mentions not any judgment. — In this case action lies against E. alone, though C. be named in the indenture. Poph. 161.

intended voyage, A. should have so much for the freight. A. brought action of covenant against B. only, and declared that B. did not pay; and it was objected that the declaration should be, that neither B. nor C. had paid. But per cur. the difference is, if the action had been brought against B. and C. then the non-payment should be alleged as to both; but when the action is brought against one only, it is sufficient to say that he has not paid; and if any other had paid, the defendant ought properly to plead it; and after argument it was adjudged for the plaintiff. Lat. 49. Trin. 2 Car. Constable v. Clobery.

S. C. — Nov. 75. S. C. accordingly. — A. and B. covenant to receive rents due to C. and D. and covenant likewise that *they and each of them* would pay a moiety thereof to each of them, viz. C. and D. C. alone brings action against A. alone, and counts that neither the defendant A. nor the other covenantor, viz. B. had paid the moiety to plaintiff. It was objected that C. and D. ought to have joined in the action; but adjudged that the action is severed by the subsequent covenant, by the apparent intention of the parties, but had it not been for that after-covenant, the action must have been joint. 8 Mod. 166. Trin. 9 Geo. Lilly v. Hodges.

It was held in case of *condition of a bond* that a release to one was also to the other obligor; but Holt Ch. J. said, they did not determine, that on *covenant, where the joint remedy failed*, there could not be a several remedy. 2 Salk. 574. in case of Clayton v. Kinston.

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18. Where merchants *covenant jointly and separately to pay according to the quantity of their wares*, an action of covenant may be brought against one alone; for the *deed is several*. Per Doderidge J. Poph. 161. in case of Constable v. Clobery.

S. C. cited by Holt Ch. J. Skin. 281.

19. Debt against a *joint-lessee* for not setting out of tithes, it was held that the action does not lie; but because it was found that he *only occupied the land*, it was held that the action well lay. Hutt. 121. Mich. 8 Car. Cole v. Wilkes.

Show. 79. S. C. but S. P. does not clearly appear. — 1 Salk. 137. pl. 1. S. C. but S. P. as to the personal tort by one does not appear. — Comb. 163. Coleman v. Sherman S. C. and S. P. accordingly by Gould, to which Holt Ch. J. agreed.

20. An action of *covenant by lessee* was brought *on a covenant in law* by the word (granted) in a demise made *by three lessors, A. B. and C.* Per Holt Ch. J. this covenant, implied by law, ought regularly to be joint. But per cur. where *one of the lessors* (as in the principal case) had actually done wrong, by having *entered on the lessee without the assent of the others*, the covenant in law shall not be taken to be joint, so as to charge the others with this *personal wrong of their companion*; for the innocent ought not to be punished with the guilty. So as to such breach by entry of one, the action is well brought against him alone; but as to other breaches, where there is no particular personal tort done by one more than another, the covenant in law is joint and not several. Carth. 97, 98. Mich. 1 W. & M. in B. R. Coleman v. Sherwin.

As in debt on the statute for carrying away corn, not setting out the tithes,

21. Where an action is *founded on a tort* done by several persons, though in one capacity, it may be either joint or several at the election of the party, as in trespass, &c. Carth. 171. Hill. 2 & 3 W. & M. in B. R. in case of Rich v. Pilkington.

and though the action is against three, and only one is found guilty, and the other two acquitted, yet this does not abate the action. Carth. 361. Mich. 7 W. 3. C. B. Bastard v. Hancock. — Where an action is founded *on a tort merely*, it is severable in its nature; resolved. Carth. 295. Hill. 5 W. & M. in B. R. in case of Child v. Sands.

In all cases where the action is founded upon matter *ex quasi contractu*, it ought to be joint against all parties; said per Cur. to be a rule in law. Carth. 62. Trin. 1 W. & M. in case of *Boston v. Sandford*.—S. C. cited and S. P. per Cur. Carth. 295. Hill. 5 W. & M. in B. R.

22. A. brought a special action on the case for a *false return of a mandamus*, directed to the bailiff, aldermen, and burgesses of R. and avers that the defendant was an alderman at that time, and that it belonged to him to swear the plaintiff; but *that he* (the defendant) *in nomine of the bailiff, aldermen, and burgesses* of the said borough, *caused a false return to be made thereto, viz. &c.* It was urged for the defendant, that it being *by consent of six other of the corporation*, the action ought to be joint, and not several. Sed non allocatur, because he could not prove that this consent was in a legal council, or that others of the corporation were summoned thereto. Carth. 229. Pasch. 4 & 5 W. & M. in B. R. *Vaughan v. Lewis*.

23. Action on a joint bond was brought against one, and a verdict was for the plaintiff; on motion in arrest of judgment, that though this might have been pleaded in abatement, yet since it appears on the face of the record that the plaintiff had no right against one alone, he cannot have judgment. The court was of opinion that it did not appear of record that the other signed, sealed, or delivered this bond; but admitting that he signed and sealed it, yet if it appeared not that he delivered it, it is the bond of defendant alone, though another is named in it with him; for it is not his deed without the delivery. 8 Mod. 242. Pasch. 10 Geo. Cloud v. Nicholson.

(E. d) Where for several Duties there shall be [71] several Actions, or only one; and when to be brought.

1. *APPEAL* of death, the defendant rendered himself at the exigent, and after escaped out of the Marshalsea, and per omnes justiciarios exigent de novo shall issue, and he was in ward at two several suits, and yet per omnes justiciarios the marshal was charged but of one escape. Br. Escape, pl. 20. cites 26 Aff. 51. Br. Escape, pl. 51. cites S. C.

2. A man cannot demand one intire debt by parcels, as to demand parcel of 20 l. due by one obligation, or of rent payable at a day by one writ or præcipe, and another parcel by another writ or præcipe. Thel. Dig. 108. lib. 10. cap. 16. s. 6. cites Trin. 1 H. 5. 7. Where rent is reserved quarterly, every quarter's rent is a several debt, and

distinct actions may be brought for each quarter's rent, and so not like debt brought for part of the money upon a bond or contract; and if there are several quarters rent due, an action of debt brought for the last quarter's rent only is good. 2 Vent. 129. Hill. 1 & 2 W. & M. in C. B. *Welbie v. Philips*.

But where he demands only one quarter, he must not shew that any more is due, as was done in *Baily and Offord's* case, without shewing that he was satisfied of the residue. 2 Vent. 129. in case of *Welbie v. Phillips*.

The plaintiff brought several actions for different arrears of rent upon the same lease: upon which the defendant moved, that the plaintiff might join them in one. Reynolds J. said, if there were several

actions

actions upon different notes, he thought the court would make him join them in one; and the court did so in the present case. Barnard. Rep. in B. R. 114. Hill. 2 Geo. 2. 1728. Jones v. Mason.

\* Cro. C. 137. pl. 11. Mich. 4 Car. B. R. in case of Baily v. Hughes, S. P. and this was held per cur. to be an incurable fault.

3. Trespass was done by 2. Per Hank. the plaintiff may have several actions of trespass, and recover the intire damages against each of them. Br. Trespas, pl. 103. cites 14 H. 4. 21.

4. For damage feasant by several horses, the owner of the land may have a several action of trespass for every horse; for every one of them did trespass. Cro. E. 8. pl. 6. Trin. 24 Eliz. C. B. per Manwood, in Tunbridge's case.

A. is indebted to B. in 4 l. lent. A. assumes upon this loan to pay the said 4 l. by 5 s. per month. Afterwards A. makes default of payment the first month. The plaintiff counts upon this assumpsit, and that the defendant has not paid him the said 4 l. nor any part of it, to the plaintiff's damage of 6 l. The defendant pleads non assumpsit; it is found against him, and damages given to 4 l. and judged the action lies, and affirmed in error. The jury in this case, where the action was brought before all the months expired, after the assumpsit, had an election either to find the whole sum in damages, or for the time of non-payment only; and if the verdict be for the whole sum, and a judgment thereupon, this shall be a bar in another action upon the said assumpsit, for default of payment of the said 5 s. any month afterwards. In this case the plaintiff may count for his damage as it really is, and have a new action upon the case upon every default. The plaintiff has his election. It is otherwise in an action of debt upon a contract, or a bill to pay at several days, where the contract or bill is for an intire sum, distributed into several payments at several times. In the principal case, the assumpsit is in the nature of a covenant. Judged and affirmed in error. Jenk. 333. pl. 68. — Nota ex hoc, That where a man brings such an action for breach of an assumpsit upon the first day, it is best to count of damages for the intire debt; for he cannot have a new action. Cro. J. 505. pl. 16. Mich. 16 Jac. B. R. Beckwith v. Nott, S. C.

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6. If I covenant with you to build you 20 houses, the covenantee shall have a several action for each default; per Anderson. Owen. 42. Hill. 30 Eliz. in case of Hunt v. Torney.

7. B. and C. trespassors, entered and occupied for half a year the land of A. and then A. re-entered and occupied for a time. Afterwards B. entered again, and A. re-entered again, and B. entered again, and held in. The question was if the entries by A. were not such an interruption of the trespass that he should be forced for every trespass to have several actions. It was held that one action with a *continuando* would serve for all, and that it would well lie with a *continuando*. And though the jury might safely find both B. and C. guilty of the trespass, yet the best way would be to find C. guilty only of the first entry. Cro. E. 182. pl. 2. Pasch. 32 Eliz. B. R. Willoughby and Sacheverel v. Sacheverel.

See tit. Waste, (P. a) pl. 11, 12. S. C. more at large.

8. A. and B. coparceners of a house. A. leases her part to M. — B. leases her part to N. — M. and N. lease their parts to J. S. — A. sells her reversion to B. and then waste is committed. B. alone brought action of waste. It was assigned for error, because one action only was brought, there being several demises by several lessors.

lessors. But Gawdy and Popham held it well. Ow. 11. Mich. 33 & 34 Eliz. B. Wardford's case.

9. *I do owe to A. B. 50 l. to be paid 10 l. at such a day, and so at 5 several days 10 l. till 50 l. be paid, and for payment whereof I bind me in 10 l. penalty; after all the 5 days are passed, A. brought debt for the 50 l. and per 3 justices the action lies; for it is a several bill for the 50 l. and a bill also for the 10 l. and he may have two actions thereupon. But Walmsley J. held it to be one intire bill, and cannot be said to be several bills, being all by one same deed; but if he had wrote in one deed, Be it known that I owe 10 l. and in cujus rei testimonium, &c. and had repeated, Be it known also that I owe 10 l. in cujus rei testimonium, &c. and put his seal thereto, this had been several bills. Whereto the other justices agreed, and said that so it was here, &c. Cro. E. 771. pl. 14. Trin. 42 Eliz. C. B. Anon.*

10. *A. delivered 40 l. to B. to be delivered to C. and B. to be divided between them. They bring two several actions of debt for their respective 20 l. Adjudged that this is well, and affirmed in error. Jenk. 263. Mich. 44 Eliz. C. B. Whereinwood v. Shaw.* Brownl. 82. Wherwood v. Shaw, S. C. ruled accordingly.—Yelv. 23. Whorwood v. Shaw, S. C. adjudged accordingly in C. B. and affirmed in error.—Mo. 667. pl. 914. Shaw v. Norwood, S. C. accordingly.—Ow. 127. S. C. accordingly.—Cro. E. 729. pl. 66. S. C. accordingly.

11. A man may have one action of debt upon several obligations. Hob. 178. pl. 205. Andrews v. Delahay. Brownl. 68. Hill. 14 Jac. S. C. accordingly.—S. C. cited Arg. 5 Mod. 213.—S. P. Arg. Cro. E. 623.

(F. d) Where, for the same Fact or Thing, the same Person may have several Actions at the same Time against the same Defendant. [73]

1. **A** Man brought appeal of mayhem and action of trespass, and counted in the one and the other at one and the same day and place; and the mayhem was in the arm, and was cut in the head; and yet, per cur. because he is to recover damages twice, as here, for one and the same trespass, therefore he held him to the one, viz. to the appeal, and was nonsuited in the trespass; for if he had done otherwise, the one writ and the other had abated. Br. Brief, pl. 305. cites 41 Ass. 16.

2. Bill of debt was brought in C. B. upon escape of a man condemned in account of 200 l. Kirton said, the plaintiff has a bill in the Exchequer of the same debt against us, judgment of the bill; & non allocatur. Br. Brief, pl. 306. cites 41 Ass. 11.

3. If A. libels against B. for three things by one libel, B. may have one or more prohibitions. Noy 131. Anon.

(G. d) Joinder in Actions against several. Where one shall answer without the other.

1. *P E R* *qua servitia* against 3, two appeared, and were put to answer; and yet the writ and the note supposed their tenancy in common. Br. Responder, pl. 46. cites 21 E. 3. 48.

2. *Replevin* against 2, the one appeared, and the other made default; he who appeared may answer for both, and save his companion. Quod nota. Br. Responder, pl. 60. cites 21 E. 3. 20.

3. *Quid juris clamat* against 2. The one appeared, and the other not. He shall not answer without the other; but it is said that the one may attorn alone; and he who appeared, pleaded that he was tenant of the whole the day of the note levied, and was not permitted to answer without the other. Br. Responder, pl. 44. cites 38 E. 3. 28.

4. *Quare impedit*; at the pene the sheriff did not return the writ, yet he shall answer well enough, because he has day by the roll; quod nota. Br. Responder, pl. 45. cites 38 E. 3. 35.

The one shall not answer without the other; per Hanke, which Thirne agreed.

5. *Waste* against 2, the one appeared at the grand distress, and the other not, and therefore he who appeared was compelled to answer alone; for the process is determined against the other; Quod nota bene. Br. Responder, pl. 25. cites 39 E. 3. 15.

Br. Responder, pl. 42. cites 14 H. 4. 37.

So if the one dies; for the receipt of the one is the receipt of the other. Quod nota. Br. Responder, pl. 5. cites 41 E. 3. 3.

6. *Account* against 2, who were adjudged to account, and *capias ad computandum* awarded, and process till the exigent, and the one was outlawed, and the other appeared, and because the process is determined against the one, the other was compelled to answer alone. Br. Responder, pl. 5. cites 41 E. 3. 3.

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\* *Præcipe quod reddat* against A. and B. who made default, by which

7. Note, that in \* *præcipe quod reddat*, or † *debt* against several, which are joint actions, there the one shall not answer without the others, or till the process be ended against the others, neither can the one confess the action, nor plead in bar against the other, nor take the intire tenancy, nor plead several tenancy by himself without the others. Br. Responder, pl. 54. cites † 46 Aff. 13.

grand cape issued, and A. appeared, and B. not, and A. said that B. had nothing in the land the day of the writ purchased, and tendered his law of non-summons; Perley said they were tenants as the writ supposed; Prist; and the other e contra; quare of this plea before the default saved. Br. Responder, pl. 55. cites 47 E. 3. 14.

† *Debt* against 2 upon obligation, the one came, and the other not, and he was not compelled to answer, notwithstanding that the obligation was that each was bound in toto without the other, because it was by a joint *præcipe*, and therefore he shall have *idem dies* by mainprise, because he came by the *capias* and process against the other; quod nota. Br. Responder, pl. 6. cites 48 E. 3. 1.

‡ All the editions of Brooke are as here, viz. 46 Aff. 13. but there is no such plea in that year, nor do I observe S. P. in that year.

*Quare impedit* against patron and

8. *Contra in trespass*, &c. against several which is several in itself, and in *quare impedit* against several where some appear and plead



plead to the issue before the others appear, and process issued against them who made default, returnable with the venire facias; quod nota bene. Br. Responder, pl. 54. cites \* 46 Aff. 13.

*incumbent  
nubo appear-  
ed at the  
distress, and  
said that*

the ~~process~~ is not served against the incumbent, and yet because they appeared they were compelled to answer. Br. Responder, pl. 16. cites 9 H. 5. 3. and 3 H. 6. 7. accordingly.

\* See at pl. supra. ‡

9. It was said, that in *real actions* against 2 or more, the one shall not answer without the other, or till the process be determined against the others. Br. Responder, pl. 59. cites 46 E. 3. 23.

10. Debt was brought against 5 upon obligation, and 2 appeared, and process continued against 3 till the exigent, and the 2 pleaded to issue, and it was upon obligation wherein every one was bound in the whole, but it was upon a joint *præcipe*, and therefore after the issue was rejected, and the jury discharged, and *idem dies* given to them till the exigent be returned, for the two ought not to have answered without the others; quod nota; but it seems, that if the 3 had been outlawed, so that the process had been determined, the 2 might have answered. Br. Responder, pl. 7. cites 48 E. 3. 21.

*Debt against  
2, process  
continued  
till the one  
was outlaw-  
ed, the other  
answered  
alone, for  
the process  
against the  
other is de-  
termined.*

Br. Respon-

der, pl. 13. cites 12 H. 4. 18.

11. In dower the tenant vouched the heir in the custody of 3 guardians quia infra ætatem, and upon process the one of the guardians [appeared,] and the others not, he shall not be compelled to answer, but shall have *idem dies* upon process against the others till the others appear, or that the process be ended; but quære where there are several guardians, and by several titles, if the one cannot enter into the warranty for his portion, because not adjudged. Br. Responder, pl. 41. cites 48 E. 3. 5.

*So in writ  
of ward of  
land and body  
against 4.  
Br. Respon-  
der, pl. 57.  
cites 49 E.  
3. 26.*

12. A man was outlawed at the suit of 2 executors, and got charter of pardon, and sued *sci. fa.* against them, and the one appeared, and the other not, and he who appeared was compelled to answer alone. Br. Responder, pl. 39. cites 3 H. 4. 10.

13. *Trespas* against 2, the one cast *superseadeas* of privilege of the chancery which is allowed, quære if the other shall answer; for it is said there, that where the one casts protection the other shall answer, and the same it seems here, and Brook says it seems that both shall answer, because it was purchased jointly. Br. Responder, pl. 14. cites 14 H. 4. 21.

14. Where *detinue* of charters was brought against 4 executors, and 3 appeared at the distress, and the 4th was returned nihil, and made default, and the 3 were compelled to answer against the opinion of several. Br. Responder, pl. 15. cites 14 H. 4.

Br. Char-  
ters de ter-  
re, pl. 21.  
cites 14 H.  
4. 23, 24.  
27. & 21 H.  
6. 1.

15. *Ward* against 3, and at the grand distress the one appeared and the others not, and the plaintiff prayed distress with proclamation against them; per Hank. you shall not have it; for the one shall not answer without the other, nor the body of the ward cannot be divided. Br. Responder, pl. 42. cites 14 H. 4. 37.

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16. So by him in writ of mesne against 3, which Thirn agreed, and so it seems that he shall have only distress infinite as at common law. Ibid.

So in trespass, maintenance, attachment upon prohibition, &c. Br. Responder, pl. 63.

17. Where the action was founded on the tort of the defendants, as in conspiracy against 2, the one appeared and the other not, he shall answer alone, and shall not stay the coming of his companion; for the tort of the one is not the tort of the other. Br. Responder, pl. 63.

### (H. d) Where several Defendants may join or sever in Pleas to the Writ.

1. **I**N debt against two upon an obligation, the one defendant pleaded that the plaintiff was covert baron the day of the writ purchased, and the other confessed the deed, upon which the plaintiff recovered the moiety of the debt against him. Thel. Dig. 214. lib. 15. cap. 2. f. 13. cites It. 4 E. 2. Estoppel 229.

2. In dower against A. and B. B. pleaded that he held parcel of the tenements as guardian, by reason of the nonage of A. who is within age, &c. judgment of the writ, not named guardian, &c. And A. pleaded that he and B. held all in common, except the same parcel; and he pleaded the same plea to the writ that B. had pleaded, and were received. Thel. Dig. 213. lib. 15. cap. 2. f. 1. cites Trin. 11 E. 3. Brief 475.

3. In writ against W. and Margaret his feme, and one Margaret Meux, Margaret who was named as feme, said that she is the same person who is named Margaret Meux, and that she is sole; judgment of the writ; and the baron for him and for Margaret pleaded Not Guilty, but she would not pass this plea; upon which issue was taken that she was covert. Thel. Dig. 213. lib. 15. cap. 2. f. 2. cites Trin. 14 E. 3. Brief 281.

4. In writ against 2, the one may plead tenancy in common to the writ, and the other may plead to the action, and the demandant shall reply to both. Thel. Dig. 213. lib. 15. cap. 2. f. 3. cites Pasch. 17 E. 3. 24.

5. In writ against several, if the one demands the view, the others cannot plead misnomer of the vill in abatement of the writ. Thel. Dig. 213. lib. 15. cap. 2. f. 4. cites Hill. 21 E. 3. 10.

6. But if the one pleads to the writ, and the others to the count, they shall be compelled to join, &c. Thel. Dig. 213. lib. 15. cap. 2. f. 4. cites Pasch. 42 E. 3. 17.

7. But in writ of entry the one may falsify the entry, and the other may plead in bar. Ibid.

8. In trespass against several, if the plaintiff counts against the one who appears where the other makes default, and after he counts against another, when he appears the one shall not take exception to the count against his companion, though they are joined in action. Br. Joinder in Action, pl. 91. cites 46 E. 3. 26.

9. In

9. In *formedon* against 3, the one took the *intire* tenancy, *absque hoc*, &c. and pleaded omission of one in the descent, in abatement of the writ, &c. and the others said that they are tenants, as is supposed by the writ, and pleaded the same plea to the writ, &c. and the demandant replied to both. Thel. Dig. 214. lib. 15. cap. 2. f. 12. cites Mich. 2 R. 2. Estoppel 210.

10. In writ against the lord and his villein, where the lord has not seisin of the land, if they vary in plea, the plea of the lord shall be received. But otherwise it is of the tenant in fact, and the parnour of the profits in assise; for there the plea of the tenant shall be received. Thel. Dig. 213. lib. 15. cap. 2. f. 5. cites Mich. 21 R. 2. Brief 788.

11. In writ against 2, the one pleaded outlawry in one of the demandants, and the other took the *intire* tenancy, and pleaded to the action, and were received. But if both take the tenancy according to the writ, there they shall join in dilatories. Thel. Dig. 213. lib. 15. cap. 2. f. 7. cites Mich. 18 H. 6, 20.

12. In writ against 2, the one pleaded *parcenary* with one E. not named, in abatement of the writ, and the other said to the writ, that he had nothing in the tenements, but only as baron in right of the said E. his feme, who is in full life, not named, &c. and were received to the two pleas. Thel. Dig. 213. lib. 15. cap. 2. f. 8. cites Mich. 22 H. 6. 19. without pleading each for that which to him belongs.

13. In debt against executors one may plead outlawry or excommunication in the plaintiff, and the other other plea. Thel. Dig. 213. lib. 15. cap. 2. f. 9. cites it as said Pasch. 7 E. 4. 8.

14. Trespass of battery against 2, who pleaded jointly of the assault of the plaintiff in their defence. It was moved, that they shall not join in plea; for their matter is several in itself; but it was agreed that it was a good plea, and that they may join in the plea. Br. Trespas, pl. 324. cites 12 E. 4. 6.

the other the like, and a good answer. Br. Trespas, pl. 427. cites 11 H. 7. 6, 7. Hufley, and Brian.

In trespass of battery against 2, the one justifies of the assault of the plaintiff, and Per Keble,

15. So to say that they were servants to N. upon whom the plaintiff made an assault, and they in defence of their master beat him, Br. Trespas, pl. 324. cites 12 E. 4. 6.

16. So where 2 justifies for arresting a man by joint warrant, Br. Trespas, pl. 324. cites 12 E. 4. 6.

17. In *scire facias* by three out of a recovery had by four, of whom one was dead before the *scire facias* purchased against two, The one of the defendants pleaded the death of one of the three, and the other pleaded that the four were in full life, &c. and durst not demur, but were advised to join in plea. Thel. Dig. 213. lib. 15. cap. 2. f. 10. cites Mich. 7 H. 7. 6.

18. Trespass against 2 of grass spoiled, they said separately that the lord of D. had common there for his tenants at will, by which the one tenant at will put in his cattle, and the other as tenant at will to the said D. put in his cattle; and a good plea, per Keble,

In trespass of a horses and the one justifies for the one and

Brian,

*the other for the other, each shall plead another plea of the horse* Brian, and Husley; for it is *all one trespass*. But Jay contra, inasmuch as the one does not justify for the cattle of the other, and the other for his cattle the like. Br. Trespafs, pl. 427. cites 11 H. 7. 6, 7.

which he did not take; for *this trespass is of several things*, contrary of grass spoiled as above; for this is *one trespass* in itself. Per Keble, Husley, and Brian, to which Fairfax agreed. Br. Trespafs, pl. 427. cites 11 H. 7. 6, 7.

Where *trespass* is brought *against several for breaking a close*, and every one of them has common there, in this case they ought to justify *severally*, and not jointly, and if one justifies as their servant, this ought to be severally, and not jointly. Br. Justification, pl. 8. cites 15 H. 7. 10.——Br. Double, pl. 59. cites S. C.

[ 77 ] 19. In trespass, if *the one justifies for a way for himself*, and the other for a way there for himself, this is a good answer, per Fairfax. Br. Trespafs, pl. 427. cites 11 H. 7. 6, 7.

So if the one pleads a licence for himself, and the other a licence for himself. Per Fairfax. Br. Trespafs, pl. 427. cites 11 H. 7. 6, 7.

20. If A. brings trespass against B. of goods carried away, and B. says that the property was in C. who made D. his executor, and died, and the ordinary sequestered and committed the administration to A. and A. administered, and after D. proved the will, and administered; judgment, &c. This is a good plea without making title to B. And the same in debt by executor, to say that the testator died outlawed, without making title. Br. Trespafs, pl. 347. cites 21 E. 4. 5. per Brian Ch. J.

But see 39 H. 6. thereof; for by them a *wowry* is in the possession, and seisin ought to be alleged, and not the recovery only. Ibid.

21. Where a man justifies in trespass for distress for rent, which he recovered of a stranger issuing out of the same land, it is no good justification to plead the recovery only, but ought to shew title also; for if he has no title the *ter-tenant*, who is a stranger, is not bound by it. Per Moyle and Billing. Br. Judgment, pl. 7. cites 35 H. 6. 10.

For more of Actions in general, see Account, Conspiracy, Covenant, Debt, Detinue, and other proper titles.

## Additions,

### (A) By the Common Law and Statute of H. 5.

1. 1 H. 5. **O**RDAINS that every \* original writ of actions cap. 5. personals, appeals and indictments, and in which the exigent shall be awarded in the names of the defendants in such writs original, appeals and indictments.

It was sufficient before the making of the statute of 1 H. 5. c. 5. that

every person should be sued by writ by his name of baptism and surname, or his name of dignity, or by both with the name of baptism, or by name of baptism and other words equivalent to the surname, As such a one the fere of her baron, such a one son or daughter of their father, such a one commoner of his abbot, &c. And sometimes he must add his name of office or ministry; and sometimes put other diversities of age, or of the place where there were divers of the same name and surname. Thel. Dig. 49. lib. 6. cap. 1. f. 2.——S. P. But if he had a name of inferior dignity (as knight, or baronet) he ought to be named by his christian and surname, and by the addition of his name of dignity, by the common law, which is implied in these words (viz. in the names of the defendants.) 2 Inst. 666.

The mischief at common law was that one was oftentimes outlawed for another; and therefore this statute was made that it might appear that he was the party sued; but if the party appears and pleads, he shews that he is the party; per tot. cur. 2 Roll Rep. 225. Hill. 18 Jac. B. R.——2 Inst. 670. S. P.

Lord Coke says, that for any thing that he had read, and remembered in the reign of H. 4. or ever before, gentlemen of name or blood had very rarely the addition of Generosus, or Armiger, as of a state or degree; but were distinguished from yeomen, who serve by the plow, by their service, viz. forinsecum servitium, but in the reign of H. 5. and ever since they have had the addition of Gentlemen, or Esquires, and the reason thereof is the [ 78 ] statute of 1 H. 5. 2 Inst. 595.

This statute binds the king as to an indictment, &c. Br. Additions, pl. 50. cites 5 E. 4. 32.

\* See (B).

*Additions shall be made of their || estate or degree, or \* mystery, and of the † towns or hamlets, or places and counties, of which they were or be, or in which they be or were conversant;*

Names of dignity, as Duke, Earl, Knight,

† Serjeant at

Law, &c. are contained within this word, Degree; for it seems that gradus contains statum in itself, and not e contra. And the estate of a man is as Gentleman, Esquire, Yeoman, Widow, Single Woman, and the like. And the art or craft of a man is his mystery, by the lord Brooke, in his abridgment of the case of 14 H. 6. 15. Thel. Dig. lib. 6. cap. 15. f. 9.

‡ For the writ by which he is called, is, viz. Statum & gradum servientis ad legem suscepturus. Br. Nofme, pl. 33. cites S. C.

The words || (State) and (Degree) in legal understanding are of one signification, and extend to persons of nobility of dignity, and under the degree of nobility and dignity, as Yeoman, &c. and as well to the clergy as to the temporality, and to graduates and degrees in universities in any kind of profession. And (Degree) is applied to all, as well women as men. 2 Inst. 666.

Some are names of dignities, as Knights of all sorts, and Baronets; and some of worship, as Esquires and Gentlemen. 2 Inst. 666.——Names of dignities are marks of distinction imposed by public authority, and they always make the very name of the person to whom they are given; but names of worship, such as Esquire, Gentleman, and Yeoman, since they are only names of distinction given in popular use, not given by the public authority of the supreme power, the law does not account them parcel of the name, and so they were not necessary at common law, in declarations and pleadings. G. Hist. of C. B. 190, 191.——But by this statute the name of worship was made equally necessary in personal actions, appeals, and indictments, as the name of dignity was before; but it does not extend to the names of the plaintiffs; for they were in no mischief or danger of being mistaken. G. Hist. of C. B. 193.

In quare impedit, it was adjudged that *Provost, Abbot and Prior*, are names of dignity, quod *quere* of *Provost*; for it seems to be a name of office, as *Parson, Archdeacon, &c.* and yet he ought to be named by this name when any thing is in demand belonging to it. Br. Nolsme, pl. 25. cites 24 E. 3.

*Master of an Hospital* is a name of dignity. Thel. Dig. 50. pl. 6. cap. 3. f. 3. cites Hill. 2 E. 3. 47.

*Gentleman, or Esquire*, is no name of dignity but of worship. Thel. Dig. 50. lib. 6. cap. 3. f. 9. cites 14 H. 6. 15. — S. P. but *Knight* is a name of dignity. Thel. Dig. 57. lib. 6. cap. 15. f. 6. cites 14 H. 6. 15. per Newton, and says see 5 E. 4. 33. accordingly.

\* It seems that a *mystery* is the craft or occupation by which a man gets his living; for *Husbandman* and *Labourer*, are good additions, and therefore mysteries. For the statute is that he shall be named of his estate, degree, or mystery, and *Miller* is no estate, as *Gent. Yeoman, Esquire, &c.* nor is it any degree, for *gradus est quasi dignitas*, and therefore it is a mystery, and the same it seems of a *Shepherd*. Br. Additions, pl. 39. cites 22 H. 6. 53.

Mystery is a large word, and includes all lawful arts, trades, and occupations. 2 Inst. 668.

† See (H).

See (M) — And if the process upon the said original writs, appeals or indict-  
See tit. ments, in the which the said additions be omitted, any outlawries be  
Utlawry pronounced, that they be void, frustrate, and holden for none;  
(G. b) pl. 18. and the notes there. — See tit. Error (D).

Debt against *J. S. citizen of York*, he pleaded to the issue, which passed against him by nisi prius, returnable 15 Mich. and the defendant pleaded in arrest of judgment, because he ought to be named of what will be is, for citizen of York may dwell, at B.. And by judgment the plaintiff recovered, because the statute is that the writ shall abate by exception of the party, and he did not take exception; but if he was outlawed, it was a good exception; contra here, because he appeared and pleaded other matter, and did not take exception; quod nota. Br. Additions, pl. 134 cites 35 H. 6. 12. — S. P. 2 Inst. 670.

If the addition prescribed by this act had varied from the record [79] Provided always, that though the said writs of additions personals be not according to the records and deeds, by the surplusage of the additions aforesaid, that for that cause they be not abated. And that the clerks of the Chancery, under whose names such writs shall go forth written, shall not leave out or make omission of the said additions as is aforesaid, upon pain to be punished, and to make a fine to the king by the discretion of the chancellor.

or deed, yet being enjoined by act of parliament to be contained in the writ, &c. such variance should not have abated this writ, though this clause had been omitted; but an act of parliament cannot be made too plain. 2 Inst. 270.

## (B) Given or necessary, in what Cases.

a Inst. 665. 1. **I**N assise, if the *disseisin* be found with force and arms, capias  
S. P. cites and exigent lies for the king pro fine, and no addition is re-  
same cases. quisite; for it is a real writ. Thel. Dig. 57. lib. 6. cap. 16. f. 2,  
In all ac- cites 9 Ass. 1. 9 E. 3. 449. Pasch. 7 H. 4. 39.  
tions where  
process of

outlawry lies, the name and surname of the defendant, and the addition of his quality or trade, and the place of his habitation then, or lately, ought to be in the original writ; otherwise the writ shall abate. And an outlawry upon such faulty writ is reverfible. And the addition ought to be as above, before any alias dictus; for the alias dictus is only reputation, and is not the truth. Per the justices of both benches. Jenk. 119. pl. 44. cites 4 E. 4. 10.

2. *Estrepement* upon writ of entry at common law, the writ of *estrepement* was *J. B. of K. the younger*, and the writ of entry was *J. B.*



*J. B. of K. only*, without addition, and the *defendant pleaded this to the writ*, that the writ of entry is brought against *J. B. of K. only*, *absque hoc* that there is any such writ against *J. B. of K. the younger*; and because *process of outlawry does not lie* in this action, therefore, *per cur.* this plea is not to the purpose; *Quod nota*; But it was agreed there, that where the party *appears by guardian*, he shall have plea contra to the warrant after that the guardian is admitted, *per cur. Contra of attorneys*; for this is the act of the party himself. And after he said that where he is supposed to be of *K. he is*, and was the day of the writ purchased of *H. and not of K.* Judgment of the writ, & non allocatur, for the reason aforesaid. Br. Additions, pl. 2. cites 3 H. 6. 16.

3. Note that where *plaint of replevin is removed out of C. B. by writ of recordare*, there the party may be outlawed without error, though it be *not named of what county, vill, mystery, or degree* he be, for the statute thereof is only in *indictments and suits by writ*, and *not suits by plaint*. Br. Additions, pl. 4. cites 3 H. 6. 30.

cap. 16. f. 3. cites same cases.—2 Inst. 665. S. P.—S. P. Br. Exigent, pl. 4. cites S. C. But contra in writ of debt, &c. which is by writ and not by plaint. So if recordare or pone is sued to remove plaint in replevin out of a base court into C. B. the writ is good, though it has no vill nor addition of the defendant, for the writ is warranted by the plaint, and shall agree with the plaint, and exigent will lie thereupon. Per June and Newton. Br. Exigent, pl. 39. cites 14 H. 6. 21.

4. It was agreed that in *præmunire* addition ought to be given; for he may have process by proclamation as well as by exigent; and therefore because exigent may be awarded addition shall be given. Br. Additions, pl. 41. cites 9 E. 4. 2.

5. In *debt*, a man may have *capias* in infinitum, and yet addition ought to be given; for he may have exigent if he will. Ibid.

6. Note, that *mainpernor* need not have addition, for name and surname suffices, and yet exigent lies, and he shall be outlawed for the non-appearance of the party, because he took it upon himself. Br. Exigent, pl. 49. cites 10 E. 4. 16.

7. If exigent be awarded upon *Withernam* he shall not have addition, unless addition were in the plaint, for they *cannot vary from the original*, and the *statute speaks of writs and not of plaints*. Br. Additions, pl. 57. cites 18 E. 4. 9.

—Ibid. pl. 65. cites S. C.—Thel. Dig. 57. lib. 6. cap. 16. f. 3. cites S. C.

8. In appeal note for law, that if a man *recovers against J. S. yeoman*, where he is a *gentleman*, and enters, the recovery is good, and the addition void; for it is *given where the law does not require addition*; contra of dignity, for this is parcel of his name. Br. Judgment, pl. 84. cites 21 E. 4. 72.

where he releases to *J. S. yeoman, who is gent.* for where addition is given where it need not by the law, and which is not any dignity, it is void.

9. *Rescous returned against J. S.* is a good return, though no addition of *J. S.* be returned. Br. Additions, pl. 67. cites 13 H. 7. 21.

S. P. Br. Additions, pl. 45. cites S. C. and 14 H. 6. 21.—Thel. Dig. 57. lib. 6.

Br. Process, pl. 80. cites S. C.

Thel. Dig. 57. lib. 6. cap. 16. f. 4. cites S. C. and Pasch. 13 H. 7. 21.

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Br. Exigent, pl. 50. cites S. C.

S. P. Br. Nofme, pl. 66.—S. P. Br. Additions, pl. 53. cites 21 E. 4. 71. So

S. P. for the statute of additions speaks only of writs

writs original in which process of outlawry lies to have addition. Br. Additions, pl. 49. cites 10 E. 4. 16.——S. P. Ibid. pl. 65. cites 10 E. 4. 15.——Thel. Dig. 57. lib. 6. cap. 16. f. 4. cites S. C. and Pasch. 13 H. 7. 21.

And if he be returned of B. and the defendant says that there were Over B. and Nether B. and none without addition in this county, it is no plea by the opinion of the court. Br. Addition, pl. 67. cites 13 H. 7. 21.——2 Inst. 665. S. P. and cites S. C. and 10 E. 4. 16. and 10 H. 7. 21.

10. An indictment of one indicted for *refusing to serve in the office of a headborough* was quashed, because it did not shew that he was chosen to the office, and because the party indicted wanted an addition. Sty. 394. Mich. 1653. B. R. Anon.

11. In all actions of trespass, and other actions sued by original where the cause of action is alleged to be *Vi & armis, or against the peace of the king*, a true addition of degree, quality, or mystery, and the true and certain place of the abode of every defendant must be put in at the peril of the plaintiff's attorney. L. P. R. 35. cites 15 Car. 2. per cur. and says the reason of making this order was, that before the act which was made for the taking away of fines for capiatur, the clerks of the crown-office used to take from the judgment rolls all the judgments which were entered with a capiatur, and then they did thereupon sue out process of outlawry; and because, if the addition was not there, they could not tell certainly who was the defendant, nor where he lived.

12. There ought to be inserted into all *affidavits*, the additions and habitations of the parties who make them. L. P. R. 35. cites Mich. 15 Car. 2. per cur.

13. A suit was *by bill against T. P. Esq*; it is no plea in abatement that the defendant is a *Gentleman, and not an Esquire*, because the suit being by bill the addition was only a description of the person, and common reputation is sufficient for it. But it should be *otherwise upon original*, on which process of outlawry lies; because the statute of H. 5. requires an addition in such case; Per Holt Ch. J. and judgment that defendant answer over. 2 Ld. Raym. Rep. 849. Mich. 1 Annæ B. R. Bennet v. Purcel.

14. 27 Eliz. cap. 7. s. 2. *No sheriff or other person shall return any juror dwelling out of any liberty, without the addition of the place of his abode at the time of the return, or within one year next before, or some other addition by which the party may be known; nor any juror within any liberty, with other addition than shall be delivered to him by the bailiff of the liberty; nor any bailiff of liberty shall return any juror, or deliver to the sheriff the names of any persons to be returned, without the addition of the place of abode, &c. and no extract of issues against any juror shall be delivered out without such addition as is put in the original panel or tales wherein such juror shall be returned; and no under-sheriff, bailiff, or other person, shall levy any issues of any other persons than of such as by the said estreat is of right charged with the said issues, upon pain that every clerk that shall write or deliver any such estreat, and every other person offending contrary to this act, shall forfeit to the queen five marks, and to the party grieved five marks.*

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6 Mod. 84.  
S. C.

15. In a *homine replegiando* the want of addition in the pluries of the place was pleaded in abatement, and upon demurrer it was adjudged,

adjudged, that the original replevin in this case is *vicontiel*, and therefore needs no addition within the stat. of 1 H. 5. and where the first is without addition it cannot be necessary in the second; but the second would thereby be vitiated. 1 Salk. 5. pl. 13. Mich. 2 Ann. B. R. Banbury (Earl of) v. Wood.

(C) Good. And given. How, as to.

Clergymen.

1. IT was held that writ of *trespass* lies against a dean, without naming him dean; but otherwise it is if land be demanded against him. Thel. Dig. 50. lib. 6. cap. 3. f. 1. cites Pasch. 5 E. 2. Brief 80.

2. One shall not be sued by name of *bishop* before that he be consecrated, but by name of such a one elect. Thel. Dig. 50. lib. 6. cap. 3. f. 1. cites Pasch. 5 E. 2. Brief 80.

3. Trespass against N. P. the defendant demanded judgment of the writ, because he is a priest, not named clerk; per Thirn, every priest is not a clerk, by which he said that he was parson of B. not named parson; & non allocatur; but the defendant was compelled to answer, per cur. Br. Additions, pl. 20. cites 11 H. 4. 40.

4. If a bishop or an abbot be deposed he loses his name of dignity, and is not bishop nor abbot after, by the opinion of Paston. Thel. Dig. 36. lib. 3. cap. 3. f. 16. cites Mich. 21 H. 6. 3.

So in the case of Bp. Bonner, after his deprivation

he was named *Theologiae Doctor* & *in sacris ordinibus constitutus* and was held a good addition in an indictment. Jenk. 228. pl. 93. Bishop Bonner's case.—*Doctor* is no addition, though he be doctor in divinity, but the word *Clerk* is sufficient addition. Jenk. 223. pl. 79.—Thel. Dig. 57. lib. 6. cap. 15. f. 13. cites it as held, that a man may sue a doctor of divinity by the addition of clerk.—It seems that doctor is no name of dignity. Br. Nofme, pl. 5. cites 35 H. 6. 55.

5. *Archdeacon* is no name of dignity. Thel. Dig. 36. lib. 3. cap. 3. f. 17. cites Mich. 27 H. 6. 5. and that so agrees that he need not name him archdeacon, Pasch. & Trin. 25 E. 3. fol. 41. 44.

In bill of præmunire against J. C. Clerk, he pleaded to the bill, be-

cause he was an archdeacon, not named archdeacon, judgment of the bill; & non allocatur; for it is no name of dignity. Br. Nofme, pl. 4. cites 27 H. 6. 5. & P. 25 E. 3. 41.

6. It was agreed, that *bishop of D. in Ireland* is a good addition. Thel. Dig. 57. lib. 6. cap. 15. f. 8. cites 22 E. 4. 13.

Nobility.

7. If a man be an earl in England, and a duke in France, he may be sued in England by name of Earl only. Thel. Dig. 36. lib. 3. cap. 3. f. 7. cites Pasch. 11 E. 3. Brief 473. and Trin. 20 E. 4. 6. agreeing, where it was said that if writ be brought against E. Baliol, being king of Scotland, it is not good if he be not named King of Scotland.

8. Ravishment of Ward against Gilbert Umfreyville, and it was abated because he was not named Earl of Angus; and yet this is out of the realm, but he comes by summons by such name to the parliament of England, and therefore it seems that he is the Earl of Angus

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Thel. Dig. 36. lib. 3. cap. 3. f. 8.

## Additions.

cites 39 H. 6. 46. **Angus in Scotland; and so see that the Scots were subjects to England.** Br. Nofme, pl. 29. cites 39 E. 3. 35.  
 But in debt, per Littleton J. *Earl or Duke of Scotland, or of France, who comes here by safe conduct of the king, may bring an action here by name of Knight, and well; for he is no earl nor duke in England.* Br. Nofme, pl. 49. cites 20 E. 4. 6.

Note that a baron shall not plead, nor be impleaded by name of baron, but by name of knight or  
 9. *A baron or lord of parliament, who is not an earl, marquess, or duke, may sue writ without naming himself baron or lord; but if he name himself lord or baron, the writ shall not abate; for it is only surplufage.* Thel. Dig. 36. lib. 3. cap. 3. f. 15. cites Mich. 8 H. 6. 10. and Hill. 32 H. 6. 35. Plowd. 225: and adds *Quære; How a viscount, and by what name he shall sue:*

*squire, and yet he shall be amerced in the Exchequer as a baron; quod nota; quod conceditur in debt there; for a baron is no name of dignity.* Br. Amercement, pl. 52. cites 32 H. 6. 30.

Duke, Marquess, Count, Viscount are suable by the said names, and *Baron* by the name of *Dominus*, and not by the name of *Baron*; for there are Barons of London, Barons of the Cinque Ports, and of the Exchequer. *Judge, Bishop, Baronet, Knight*, are all names of dignity; writs by them or against them ought to name them so. If a duke, &c. be a knight, the naming him duke, &c. is sufficient; for the greater dignity comprehends in it knight. Grant made to them ought to be by these names. Jenk. 209. pl. 42. cites 9 Rep. 47. [Trin. 8 Jac.] The Earl of Shrewsbury's case.

Baron is not a name either of dignity or addition. Dav. Rep. 60. cites 8 H. 6. 10. a. Ld. Lovell's case.

10. If a man be a duke, a marquess, earl, viscount, and baron, all these dignities stand distinctly in him, and the greater *drowneth not the lesser*; yet shall he be named in original writs, &c. by the *worthier dignity*, viz. by the name of a duke only, within this act. 2 Inst. 669. cites 27 H. 6. 4. 4 E. 4. 10. 5 E. 4. 142. 35 H. 6. 12.

11. All dukes, marquesses, earls, viscounts, and barons of other nations, or which are not lords of the parliament of England, are named *Armigeri*, if they be no knights; and if knights, then are they named *Milites*. 2 Inst. 667.

12. In writ of entry the defendant was named *A. Viscount M.* and did not name him knight. The writ was held good; for viscount is a more high dignity than lord or baron. Dal. 42. pl. 23. 4 Eliz. Ld. Mountacute's case.

*Bishop of, &c. in Ireland, is a good addition; but not any Irish temporal dignity.* 2 Hawk. Pl. C. cap. 23. f. 108.—S. P. Br. Additions, pl. 32. cites 21 H. 6. 3.  
 13. A count palatine of Nova Albion, or a count of Ireland, are not additions in England; per Roll Ch. J. Sti. 173. Mich. 1649. Weston v. Plowden.

14. A grant to a duke's eldest son by the name of a marquess, or to the eldest son of a marquess by the name of an earl, (& sic de similibus) would be good, because of the common curtesy of England, and their places in heraldry; per Holt Ch. J. Carth. 440. Hill. 9 W. 3. B. R. The King v. Bishop of Chester.

*Wives and Widows of Noblemen.*

Note if a Dutches, or other such

15. Debt against a man and his wife, Countess of B. Martin said, that in this case she has lost her name of Countess by the taking of the baron; for by the taking of the baron, all the names which she had before

before are lost, which Paston affirmed. Br. Nofme, pl. 32. cites *late, mar-  
ries with a  
gentleman*  
14 H. [6.] 2.

or esquire, she by this *shall lose her dignity and name*, as in case of the Lady Powis and Dutchess of Suffolk; the one married Howard, and the other Adryan Stokes; for *quod noster nobilitas superserit ignobili definit esse nobilis*.—Br. Nofmes, pl. 69. cites **[ 83 ]**  
tempore, M. 1.—But see anno 14 H. 6. 18. where it is admitted clearly in such case, that she shall not lose any dignity. Ibid.—Br. N. C. 5 M. pl. 499. cites 14 H. 6. 2.—Thel. Dig. 36. pl. 11. cites S. C.

A writ against Thomas Earl of A. and M. his wife, is good; for this implies Countess; per cur. Br. Nofme, pl. 2. cites 2 H. 6. 11.—Br. Brief, pl. 6. cites S. C.

One who had married the Countess of Northumberland brought debt against J. S. and she was named Countess in the writ, and it did not abate. D. 202. pl. 69. Marg. cites Pasch. 36 El. Rot. 501. Felton & Countess of Northumberland, his wife, v. Burrough.

16. The lady who was *feme to an earl* sued writ of dower, and of Cui in vita, by name of such a one who was the feme of such an earl, and not by name of Countess; and so she shall be named in writ of waste brought against her of land which she holds in dower; but if she holds for her life, and in assise, she shall be named Countess. Thel. Dig. 36. lib. 3. cap. 3. l. 8. cites Hill. 12 E. 3. Brief 254. and Trin. 2 H. 6. 11. and 22 Aff. 24. Note that in every suit the party ought to be named by his name of dignity, if he be of dignity, or otherwise

the writ shall abate; but where the writ of waste was against M. late wife of Thomas late Earl of A. deceased, and she was not named Countess; and yet well, because it is tantamount; for she cannot be late wife of Thomas Earl, &c. but she shall be Countess, if special matter be not shewn to the contrary. Br. Nofme, pl. 2. cites 2 H. 6. 11.

17. But a writ of *scire facias* was maintained against Constance, who was the wife of Thomas Earl Marshal, by this name, without the name of Countess, because it appeared by the writ that she was joint feoffee with her said late baron, &c. Thel. Dig. 36. lib. 3. cap. 3. l. 10. cites Mich. 8 H. 4. 19. But says it was held there clearly, that after the death of the earl she ought not to change the name of countess.

18. In præcipe quod reddat, if the *feme of a baron, who is neither a dutchess nor countess*, be named Lady E. of M. this is only surplusage, and the writ shall not abate by it; quod nota by award. Br. Nug- The wife of a Duke, Earl or Baron, in all writings, shall be named  
gation, pl. 13. cites 8 H. 6. 10.

Ladies; but the wives of Knights shall be named Dames; per cur. Het. 83. Pasch. 4 Car. C. B. Anon.

19. A Countess dowager peradventure ought to be named *comitissa* *dotissa*, otherwise the writ will abate; per Pemberton Ch. J. Mich. 33 Car. 2. B. R. Skin. 15. in pl. 16.

20. Knight cannot be omitted in any suit or grant; but contra of Gentleman and Esquire; for these need not be expressed, but in suits where process of outlawry lies by the statute of 1 H. 5. which wills, that there a man shall be named by the degree, state, or mystery that he is of. Br. Nofme, pl. 33. cites 14 H. 6. 15. Knights, &c.

Thel. Dig. 36. lib. 3. cap. 3. l. 14. cites Hill. 11 H. 4. 198. and 7 H. 6. 15. and Hill. 14 H. 4. 21. 24 H. 6. 15. Mich. 15 E. 4. 14. In every writ for or against a Knight, he ought to be named Knight, &c.

21. A writ of error was brought to remove a record between G. S. Knight and Baronet, and the truth was that Sir G. S. is not, Hob. 327. pl. 400. S. C. but  
neither.



S. P. does not appear. —Cro. J. 633. pl. 5. cites S. C. that Sir G. S. never was a Knight, but a Baronet only; and it was held a manifest variance, and that the record was not removed. neither was named *Knight* in all the record. And per cur. the word *Knight* is part of the name, and so no record was removed; and is so material, that the *addition* where there is none, [where he is not] or the *omission* where he is knight, makes it no such record. Hutt. 41. Mich. 18 Jac. *Sherley v. Underhill*.

[ 84 ] *Knight* is not an addition, but part of a man's name; for it being a name of dignity, it becomes as much a part of a man's name as his name of baptism; per Holt Ch. J. Carth. 440. Hill. 9 W. 3. B. R. *The King v. Bishop of Chester*. —5 Mod. 302. S. C. & S. P.

Noy. 87. S. C. says, that Mr. Holbourn said it was resolved in 22. A knight and *baronet* was indicted for not repairing a highway, and named only *knight*, and good, because baronet is a title since the statute of additions. Lat. 169. Trin. 2 Car. *Sir Richard Lucy's case*.

C. B. [in some other case,] that in an action brought against a baronet, he ought to be named Baronet, and that there is a clause in the patent that they shall be impleaded by such name, and the indictment in the principal case was quashed, because it did not shew of what place the defendant was inhabitant. —Lat. 169. S. P.

Jo. 346. S. C. accordingly, and that the warrant to arrest him was not good. —Cro. C. 371. pl. 6. *Sir Henry Ferrer's case*, S. C. accordingly. 23. *Sir William Ferrers Baronet*, was arrested upon debt by the name of *William Ferrers Knight and Baronet*, and one of the serjeants was killed, upon which he was indicted Trin. 10 Car. in B. R. and resolved per cur. that it was not murder, because the *capias* was misawarded. D. 88. Marg. pl. 107.

24. *Trespass* against A. B. *Baronet*; he pleads in abatement that he is a *Knight and Baronet*, and good. Carth. 14. Mich. 3 Jac. 2. B. R. *Jeffries v. Snow*.

aLd. Raym. Rep. 859. *Lapierre v. German*, S. C. says he was sued by the title of *Bart.* only, and defendant 25. *Assumpsit* by bill against *Sir J. G. Knt.* The defendant pleaded in abatement that he was *Knt. and Bart.* It was moved to amend upon payment of costs, and insisted that the action being by bill the addition was not material, not being within the statute of additions; but it was denied to amend, there being nothing to amend by, and the defendant had taken advantage of the fault. 1 Salk. 50. pl. 12. Pasch. 2 Ann. B. R. *Lepara v. Germain*.

pleaded he was *Knt. and Bart.* and issue was joined thereupon, and the court would not make a rule for amendment. It was then moved, that the latitat was *Knt.* only, and therefore moved to make the declaration agreeable to the latitat, for that the omission of *Bart.* in this case being a suit by bill was not material, because *Bart.* is not part of the name as *Knt.* is, and suits by bill are not within the statute of additions; and Powel J. seemed to be of that opinion, saying that the books warrant such a difference, and cites the 36 H. 6. 30. as that a *Baron* needs only be named as a *Knt.* or *Esq;* in a writ; and Holt Ch. J. agreed the said case, but said the reason of it was, that then Barons were so by tenure, and were summoned to parliament by right, and were not then created by letters patent, as at this day; but that then the law was otherwise of titles of dignity, as of *Earl*, which was part of the name, and now it is otherwise of Barons, when they are created by letters patent, for now it is a title of dignity, and parcel of the name, the same law of *Bart.* which is made a title of dignity by letters patent, and therefore a Baronet ought to be named so in all judicial proceedings, otherwise they will abate, and it is no objection that it is a new title, for so is *Viscount*, begun in the time of H. 6. *Marquess* in the time of R. 2. and *Duke* in E. 3. and though they are new titles they shall be named so in all proceedings against them.

26. *J. S. Miles*, and *J. S. Dominus*, are to be intended two different persons. In records and legal proceedings the whole name is to be



be set forth, and therefore in such case J. S. Mil. must be intended of such an one, Mil. who was no lord. 10 Mod. 284. Hill. 2 G. O. i. B. R. Nutton v. Crow.

Esquires and Gentlemen.

27. If a gentleman will occupy any trade, he may be called and written by the name of his trade, and not gentleman. Cro. E. 884. pl. 20. Pasch. 44 Eliz. C. B. Devent v. Popham.

28. The sons of all the Peers and Lords of parliament in the life of their fathers, are in law Esqs. and so to be named. By this statute the eldest son of a Knt. is an Esq; 2 Inst. 667.

29. A man may have an addition of gentleman within this statute, if he be a gentleman by office, (though he be not by birth) as many of the king's household and of other lords be, and clerks being officers in the king's courts of record; and if they be out of their office they are but yeomen, and yet as long as they continue in their office they ought to be named gentlemen as their due addition. 2 Inst. 668. cites 28 H. 6. 4. a. 5 E. 4. 33. accordingly. 14 H. 6. 15.

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A gentleman by reputation, that is, neither gent. by birth, nor by office, nor by creation,

but commonly called Gentleman, and known by that name, is a sufficient addition within this act; and so it was adjudged in Eater's case; Hill. 25 Eliz. C. B. but if he be named Yeoman he cannot abate the writ. 2 Inst. 668. — A mathematick master being offered for bail by the name of Gentleman, Holt said he was one by his profession. 12 Mod. 249. Mich. 10 W. 3. White v. Mullony.

30. And Generosus & Generosa are good additions, and if a Gentlewoman be \* named Spinster in any original writ, &c. appeal or indictment, she may abate and quash the same; for she hath as good right to that addition as Baroness, Viscountess, Marchioness, or Dutches, have to theirs. 2 Inst. 668.

\* D. 88. a. b. pl. 107. Trin. 7 E. 6. S. P.

31. There is small difference between an esquire and a gentleman; for every esquire is a gentleman, and every gentleman is arma gens. 2 Inst. 668.

Since the making of this statute, Esquire and Gentleman

were more frequently by force of this act used, as additions in originals, &c. and afterwards were commonly used in deeds and other specialties. 2 Inst. 668. cites 35 H. 6. 55. b.

32. Where J. S. gentleman of D. was outlawed, and J. S. of D. was taken on the capias utlagatum, it was held that he may plead this, and if on the scire facias he be found yeoman and not gentleman, he shall be discharged; for the outlawry remains in force against J. S. of D. Gentleman. Jenk. 116. pl. 29.

Ad libitum.

33. The additions of Yeoman or Gentleman are additions ad placitum. Per Roll. Ch. J. Sty. 153. Mich. 24 Car. in Tylson's case.

34. A man may have one addition at one day and in one place, and yet may have another different addition at another day, and in another place, Mich. 22 Car. B. R.; for some additions, viz. of Esquire, Gentleman, Yeoman, &c. are no part of the name, but additions ad libitum, and as people please to call them; but the title of Knight or Baronet is part of the party's name, and it is material to be rightly

rightly used in pleading, but the titles of *Gentlemen or Yeomen* are additions *ad placitum* to be used or not used, or to be varied. L. P. R. 34. cites Mich. 24 Car. B. R.

Against law.

Br. Additions, pl. 8. cites 9 H. 6. 65. S. P.—

*Chopchurch*

is adjudged a good addition. Thel. Dig. 56. lib. 6. cap. 15. f. 3. cites Hill. 9 H. 6. 65.—Br. Additions, pl. 8. cites S. C. and S. P. accordingly; for it is a thing permitted by the law.

*Thief* is not a good addition, because it is a thing punishable by the law. Br. Additions, pl. 8. cites 9 H. 6. 65.

*Vagabond, heretick, nor extortioner* are not good additions, for he ought to give lawful addition, and these additions are not lawful. Br. Additions, pl. 60. cites 22 E. 4. 1.—S. P. and so of *Abbot*. 2 Inst. 688.

As to other matters.

Thel. Dig. 56. lib. 6. cap. 15.

f. 3. cites S. C. and that it was said there.

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37. *Burgess* is not a good addition. 2 Hawk. Pl. C. 188. cap. 23. f. 111.

2 Inst. 668.

S. P. For it is not an

addition of any mystery or occupation.——Thel. Dig. 57. lib. 6. cap. 5. f. 10. cites Pasch. 5 E. 4. 32.

Br. Additions, pl. 15. cites

35 H. 6. 55. S. P.

39. *Carpenter* is a good addition in debt. Br. Additions, pl. 39. cites 22 H. 6. 53. says it appears in a note there.

S. P. For it is not an

addition of any mystery or occupation. 2 Inst. 668.——Thel. Dig. 57. lib. 6. cap. 15. f. 10. cites Pasch. 5 E. 4. 32.

Præcipe [J. S.] Civi & Parrario de London, &c. is not good.

Thel. Dig. lib. 6. cap. 14. f. 8. cites Mich. 35 H. 6. 12.

41. *Citizens and burgesses* (though they are such as are called to parliament) are not sufficient additions within this act, as being too general. 2 Inst. 668. cites 27 H. 6. 4. 4 E. 4. 10. 5 E. 4. 142. 1 H. 5. 3. 35 H. 6. 12.

Thel. Dig. 56. lib. 6. cap. 15. cites S. C. & S. P. that it is not good.——

S. P. 2 Inst. 668. that it is not good, because it is not of any mystery.

42. Trespass against J. N. of B. in the county of N. *Farmer*, Moyle demanded judgment of the writ; for here is no addition certain; for Knight, Gentleman, and Poor Man, each of them may be farmer, and so it is no condition, degree, nor mystery, as the statute wills. Quære. Br. Additions, pl. 10. cites 28 H. 6. 4.

43. *Greame* is admitted to be good addition, and the same law of *Page*; and note that name of dignity is parcel of his name. Contra of Esquire, Page, &c. which are not, but addition. Br. Additions, pl. 58. cites 21 E. 4. 71. S.P. 2 Inst. 668. that it is no addition within the statute

of H. 5. because it is not any mystery.

44. Indictment by the name of P. W. *Hospes*, without an Anglice, or if it had been Anglice *an host*, it is no good addition. Sid. 247. pl. 11. Pasch. 17 Car. 2. B. R. the King v. Warren.

45. *Husbandman* is a good addition. Br. Additions, pl. 39. cites 22 H. 6. 53. 2 Inst. 668. S. P.

46. *Labourer* is a good addition; per cur. Thel. Dig. 56. lib. 6. cap. 15. f. 1. cites Hill. 3 H. 6. 31. and that so it is agreed Pasch. 5 E. 4. 33. Br. Additions, pl. 39. cites 22 H. 6. 53. S. P. — 2 Inst.

668. S. P. — But Labourer is *not* a good addition for a woman. 2 Ld. Raym. Rep. 1169. Powel J. cited it as Pasch. 5 Annæ, B. R. the Queen v. Maddox. — 2 Salk. 613. pl. 7. S. C. but S. P. does not appear.

47. Note that *Litter-man* was admitted a good addition in *de-tineue*. Quære what mystery this is? Br. Additions, pl. 59. cites 21 E. 4. 77. Thel. Dig. 57. lib. 6. cap. 15. f. 11. S. P. cites Hill.

21 E. 4. \* 92. — The Year-book says, Quære of this addition; for it is a marvellous mystery, &c. — [But Quære if it be not Lighterman, or perhaps Hostler.]

\* This seems misprinted; there not being so many folios.

48. *Mercer* is a good addition. Thel. Dig. 56. lib. 6. cap. 15. f. 2. cites Trin. 4 H. 6. 26. and Trin. 5 E. 4. 33.

49. *Merchant* is a good addition; per tot. cur. Thel. Dig. 56. lib. 6. cap. 15. f. 2. cites Trin. 4 H. 6. 26. and Trin. \* 5 E. 4. 33. [87] Br. Additions, pl. 56. cites 10 H. 6.

21. S. P. — In debt against J. N. of B. *merchant*, Rolfe demanded judgment of the writ; for it is no mystery certain; for merchants are of several mysteries; & non allocatur; for per tot. cur. it is a good addition. Br. Additions, pl. 40. cites 4 H. 6. 26.

\* Br. Additions, pl. 50. S. P. cites 5 E. 4. 32. S. C.

50. *Miller* is a good addition in debt. Br. Additions, pl. 39. cites 22 H. 6. 53. and says it appears in a note there.

51. *Pantler* is no addition; for it is no mystery or occupation. 2 Inst. 668.

52. *Schoolmaster* is a good addition, for it is a mystery; per cur. 2 Le. 186. pl. 232. Mich. 32 Eliz. B. R. Farnam's case.

53. *Trespass against R. S. of B. Yeoman, and A. B. his Servant*, and it was demanded judgment of the writ, because A. B. had not sufficient addition; and by the opinion of Babbington and others there, *Servant* is as good addition as Labourer is, by which Rolfe passed over; quære, for concord' lib. intr' fo. 25. But contra 9 E. 4. 48. Br. Additions, pl. 5. cites 3 H. 6. 31. Thel. Dig. 56. lib. 6. cap. 4. f. 1. cites S. C. accordingly, by Babbington. — In debt, or trespass, or

action in which process of outlawry lies, *Servant* is no good addition upon the 1 H. 5. for every man is servant to the law and to the king. Jenk. 126. pl. 57. cites 7 E. 4. 10.

54. A man was indicted by name of J. B. of S. Servant, and all the justices, *Servant* is no addition; for every one who is in service S. P. per tot. cur. Br. Additions

tions, pl. 55. *Service is a servant, be he knight, esquire, gent. yeoman, greome,*  
 cites 7 E. 4. 10.—In- *widow, damsel, priest, friar, &c.* Br. Additions, pl. 50. cites  
 dictment 5 E. 4. 32.  
 against *W.*

*N. Servant to J. S. late of C. in the county of N.* is not good; for *Servant* is no addition, and these words, *late of C.* shall be intended of the master, and not of the servant. Br. Indictment, pl. 49. cites 9 E. 4. 48.

Where the defendant was indicted by the name of *A. B. Servant*, it was objected not to be a good addition within the statute; but per Holt Ch. J. and Cur. it is a good addition; for it is certain. 2 Ld. Raym. Rep. 968. Trin. 2 Annæ, Anon.

So where a servant was indicted for a trespass done by him by the command of his master, by the name of *A. B. Servant to J. S.* Holt Ch. J. held that (*Servant to J. S.*) is a good addition. 6 Mod. 58. Mich. 2 Annæ, B. R. the Queen v. Holkins.

*Servant generally* is no good addition. Thel. Dig. 56. 55. Some held that *Servant* was a good addition. Br. Additions, pl. 56. cites 14 E. 4. 7. But Brooke says *Quære*; for *Servant* is no addition by the common law, as it is said there.

lib. 6. cap. 15. f. 1. cites 5 E. 4. 33. and Trin. 7 E. 4. 10. and Hill. \* 9 E. 4. 50.—\* S. C. cited D. 46. b. pl. 2.—*Servant* is no addition within the statute H. 5. because it is not any mystery. 2 Inst. 668.

56. *Smith* is a good addition in debt. Br. Additions, pl. 39. cites 22 H. 6. 53. and says it appears in a note there.

Br. Additions, pl. 64. cites S. C. and S. P.— 57. It is said that *Single-woman* is a good addition of one that is no virgin, wife, nor widow. Br. Additions, pl. 56. cites 14 E. 4. 7.  
 Br. Additions, pl. 64. cites 10 H. 6. 21. S. P.

S. P. per cur. obiter. Sid. 247. Pasch. 17 Car. 2. B. R. in pl. 11. 58. *Spinster* is an addition indifferent to a man as well as to a woman; for per Spilman, there are divers men in Norfolk that are worsted-spinsters. D. 47. a. pl. 5. Pasch. 31 & 32 Eliz.

Br. Additions, pl. 39. cites 28 H. 6. 53. and says it appears in a note there that it is a good addition in debt.—2 Inst. 668. S. P. 59. *Taylor* is a good addition. Br. Additions, pl. 15. cites 35 H. 6. 55.

[ 88 ] 70. *Quære of degrees of doctors, masters, and such like of the universities.* Thel. Dig. 57. lib. 6. cap. 15. f. 13.

He that hath taken any degree in either university, may be named by that degree without question, being within the direct letter and meaning of this act; and if he hath taken any degree in divinity, he may have the addition of *Clerk*. 2 Inst. 668. cites 35 H. 6. 55. b.

Br. Additions, pl. 66. cites S. C. and S. P.— 71. *Widow* is a good addition; quod nota. Br. Additions, pl. 64. cites 10 H. 6. 21.  
 Thel. Dig. 56. lib. 6. cap. 15. f. 4. cites S. C. and S. P. and 14 E. 4. 8.

72. *Wife* is a good addition; per cur. 2 Le. 183. Mich. 32 Eliz. B. R. in pl. 226.

Yeoman is a good addition within the statute H. 5. and is applied only to the man and not to the woman. 2 Inst. 668. cites 10 E. 4. 16. 73. *Yeoman* cannot be outlawed by the addition of *Husbandman*, and upon pleading that he was yeoman issue was joined, and it was tried by a jury. Jenk. 127. pl. 59.

(D) Where there are several of the same Name,  
How they are to be distinguished.

1. **I**N *account*, one who had the same name with the defendant proffered himself ready to answer if, &c. And the plaintiff replied that he was not the same person against whom, &c. And because he did not put a diversity of the names, as *Elder or Younger*, the writ was abated. Thel. Dig. 54. lib. 6. cap. 13. f. 1. cites Hill. 18 E. 2. Brief 834. and that so agrees Pasch. 14 E. 3. Brief 271. and Mich. 22 E. 3. 14.

2. In *præcipe quod reddat* against W. de M. The tenant said that there were 2 W.'s de M. in the same vill, viz. *the son of W. and the son of H.* yet the writ did not abate. Thel. Dig. 54. lib. 6. cap. 13. f. 2. cites Mich. 20 E. 2. Brief 850. and that it was so agreed in dower, Pasch. 1 E. 3. 9. For he who appears may disclaim if he be not tenant.

3. In *trespass* brought against one W. and J. his son, the opinion was that the writ should abate, because he had 2 sons named J. and no diversity put, &c. because it is in action where a man shall be outlawed. Thel. Dig. 54. lib. 6. cap. 13. f. 3. cites Mich. 5 E. 3. 230. 241.

4. In *account* against Jo. B. it is no plea to say that there is Jo. B. the father, and Jo. B. the son, and that he is the father, &c. For the father shall not change his name for the son. Thel. Dig. 54. lib. 6. cap. 13. f. 4. cites 8 E. 3. Brief 449. Pasch. 20 E. 3. Brief 683. And that so it is adjudged Pasch. 7 H. 4. 14. and Hill. 21 H. 6. 29. Trin. 33 H. 6. 33. and Mich. 33 H. 6. 53. and Hill. 39 H. 6. 48.

5. He need not give addition for diversity of the name of the plaintiff. Thel. Dig. 55. lib. 6. cap. 13. f. 10. cites Hill. 18 E. 3. 4. and says see Hill. 32 H. 6. 33.

6. But in *assise* against Jo. de Ma. it was pleaded that there were 2 Jo.'s de Ma. the elder and younger. Thel. Dig. 54. lib. 6. cap. 13. f. 2. cites 22 Aff. 14.

7. But in *account* against W. de W. one said that there were 2 W.'s de W. the elder and the younger, and that he was the younger, by which the writ abated. Thel. Dig. 54. lib. 6. cap. 13. f. 3. cites Trin. 4 E. 3. 145. and 28 E. 3. 94.

8. If there be J. S. the father, and J. S. the son, and the father is impleaded by action of trespass, he shall not have the addition of elder; for the father shall not change his name for the son; but it is said elsewhere that the son shall be named the younger, where he is impleaded by trespass. Note a diversity. Br. Misnomer, pl. 65. cites 21 H. 6. 26, 27. and \* 7 H. 4. 11.

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Where the father and son, or the elder brother and younger are of one and the same

name, the elder or the father shall not change his name for the younger or for the son; but the son or the younger brother shall be named J. C. the younger. Br. Nofme, pl. 30. cites † 37 H. 6. 29.

*Trespass* upon 5 R. 2. The defendant said that there are 2 of his name in the same vill, elder and younger, and it is not expressed which of them he is; & non allocatur, because he is the same person;

son; and it is said there, that the younger shall have addition, but not the elder, and especially in case of the father and his son; for the son shall give place to his father, and shall have addition; e contra of the father. Br. Addition, pl. 12. cites 33 H. 6. 53 & 54.

\* Br. Additions, pl. 18. & pl. 34. cites S. C. in exigent.

† Br. Additions, pl. 43. cites S. C.

9. No addition shall be put to differ the names in *indictment*; for this shall change the indictment, which cannot be without the jurors. Thel. Dig. 55. lib. 6. cap. 13. f. 6. cites Mich. 9 H. 4. 3.

10. Debt against J. S. of B. yeoman. The defendant said that there are 2 J. S.'s of B. yeomen, viz. he and his father, and because he is not named younger, judgment of the writ; and by several, the son shall change his name for the father, but not the father for the son, nor one cousin for another, nor a stranger, nor a neighbour for another, but between father and son only; and per Prisot, the addition shall not be younger, but J. S. son of J. S. Quod nota. Br. Additions, pl. 47. cites 39 H. 6. 46.

Where there is any matter distinguishing the person,

it makes the addition of Senior and Junior not necessary; as where the action was against A. B. in custodia Mareschalli; there if you would take advantage of the want of addition, you must shew that there is A. B. the father, &c. in custodia Mareschalli too. 1 Salk. 7. pl. 16. Hill. 2 Anne, B. R. Lepiot v. Brown.

12. Debt upon a lease for years against J. E. and one J. E. came to the bar, and prayed the court to mark him; for he said that there are 2 J. E.'s in the same vill, viz. the father and the son, and the son is he who now appears at the exigent, and prayed that the plaintiff declare against him, who did so; to which he said that the plaintiff did not lease to this J. E. who now appears, &c. prout, &c. Per Jenney, This is no plea; for he ought to say that he did not lease generally; for by his \* appearance he has affirmed that he is the same person. And the court in a manner agreed, that he who is impleaded shall be intended the father, because he is impleaded without addition, and so it shall be intended that he who appeared is the father, because he appeared generally; and did not shew the lease made to him where he is son, in which case he shall be named junior; and after it was held by the court that it is a good plea for the defendant, quod non dimisit, prout, &c. to the aforesaid J. E. and therefore it seems the plaintiff might have said, that he who appeared is not the same person, but other of the same name, with addition, &c. Br. Misnomer, pl. 49. cites 5 E. 4. 57.

See (P)

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13. But in *præcipe quod reddat* it was held, that he need not to put addition of Elder or Younger, but where there is father and son. Thel. Dig. 55. lib. 6. cap. 13. f. 9. cites Mich. 33 H. 6. 53. and says see 9 H. 7. 21. agreeing. And that so it is held Hill. 39 H. 6. 48. where it was granted also for law, that when he who appears is the same person who is sued, he need not give addition for diversity; but when another of the same name and surname appears, who is not sued, then the plaintiff ought to give diversity; and that so agrees Pasch. 27 H. 8. 1.

14. Tres-



14. Trespass against *J. S. of D.* The defendant said that there are 2 *J. S.'s* in *D.* the eldest and the youngest, and this is the youngest; judgment of the writ for default of this addition; and because he is not outlawed, nor ever appeared, nor at any mischief, this addition was entered in the roll, and the writ awarded good. Br. Brief, pl. 471. [468.] cites 44 E. 3. 34.

(E) Good. Without Surname.

1. **B**UT writ brought against *William Melton, archbishop of York*, was adjudged good. Thel. Dig. 35. lib. 3. cap. 3. f. 5. cites Hill. 12 E. 3. Brief 480.

2. Writ was brought against the *master of an hospital*, by his *name of baptism* and *name of dignity* in the commencement of the writ, and after in other places of the writ by his *name of baptism only*, and adjudged good. Thel. Dig. 51. lib. 6. cap. 3. f. 12. cites Hill. 7 E. 3. 309.

Mich. 24 E. 3. 31. where it was said that he ought always to name him by his name of dignity only, and in the other places of the writ, 22 E. 3. 5. and that so agrees 26 Ass. 11. and Mich. 7 H. 6. 14. But says Quere in a writ against a knight and serjeant at law.

3. *Plaint in replevin* was, that *Johannes Capellanus Cantarie Beate Marie de D. queritur, &c.* and because *no surname was expressed*, the *plaint* was abated, and *return* awarded; notwithstanding it may be intended, by *Prisot*, that he is incorporated by such name. Br. Nofme, pl. 3. cites 27 H. 6. 3.

4. But it was agreed, that *J. Abbot*, or *J. Mayor, &c.* is good without surname. Br. Nofme, pl. 3. cites 27 H. 6. 3.

*mayor of such a city, brings writ, and pending the writ another is made mayor*, the writ shall abate; but it is otherwise if he be named *Jo. Stile Mayor, &c.* per *Prisot*. Thel. Dig. 186. lib. 12. cap. 16. f. 8. cites 31 H. 6. 35. for he has now such name by which he may be sued; but in the first case by the making of the new mayor his surname is gone.

5. It is sufficient for *men of dignity* to name themselves by their names of baptism and of dignity without any other surname, as *John Duke of A. John Earl of A. Richard Bishop of A. William Abbot of W. &c.* Thel. Dig. 35. lib. 3. cap. 3. f. 5. cites Hill. 7 E. 4. Brief 163.

Holland earl of Huntingdon. Thel. Dig. 35. lib. 3. cap. 3. f. 5. cites 7 H. 6. 29. but adds quere, for Fitzh. does not abridge it so.

A *Duke, &c.* by the common law might be named by his Christian name and name of dignity, which stands in lieu of his surname. 2 Inst. 666.

6. It was said, that writ brought against one by name of *J. Filia R. Stile* is not good, because there is no surname before this word (*Filio.*) Thel. Dig. 50. lib. 6. cap. 2. (bis) f. 2. cites Trin. 10 E. 4. 12.

But Ibid. f. 13. says the contrary is adjudged in the case of a *provoost*.

And so of a *parson* or *vicar*; for they shall both be named. Ibid.

But if a mayor by name of *Jo.*

Martin was of opinion, that in trespass an earl should have a surname, as John

## (F) With a Nuper.

1. **A** Writ of debt was adjudged good against one who had been clerk of the works, &c. of the king for things sold to the use of the king whereof the defendant was allowed in the Exchequer, without naming him nuper clericum of the works, &c. Thel. Dig. 51. lib. 6. cap. 4. f. 2. cites Mich. 11 H. 4. 28.

Br. Brief,  
pl. 436. cites  
S. C.

2. Debt against *A. B. of S. late of A.* and the defendant answered to both, the plaintiff shall maintain but the one only; nota; but Brooke says it seems it shall not be suffered at this day. Br. Additions, pl. 31. cites 19 H. 6. 66.

3. Debt was præcipe *W. B. late bishop of Landaffe*, alias dictus late prior of C. and because he did not shew of what degree he is the day of the writ purchased, therefore the writ was abated. Br. Additions, pl. 32. cites 21 H. 6. 3.

S. P. Br.  
Brief, pl.  
252. cites  
S. C. and  
S. P. —  
Thel. Dig.  
57. lib. 6.  
cap. 17. f.  
3. cites 38  
H. 6. 28.

4. Where a man is impleaded by name of R. S. of L. merchant, late attorney for N. that which comes after the nuper is void, unless in special cases, as where he is impleaded by name of R. S. of L. esq; late sheriff or escheator of such a county, and counts of an act done by reason of his office, and contra where he counts of a thing which does not come by reason of his office. Br. Additions, pl. 48. cites 38 H. 6. 24.

Brief 139. — Br. Nofme, pl. 34. cites S. C. and that which comes after the nuper is not parcel of his name.

S. P. and so  
of estate or  
degree, and  
not nuper  
bishop, &c.  
Thel. Dig.  
57. lib. 6.

5. In præmunice the defendant was named *late monk of B.* and it was held, that a man ought to be named by the statute of what mystery he is at the time of the writ, &c. precisely, and not of what mystery he was; but as to the vill he may say nuper of such a vill; note a diversity. Br. Additions, pl. 41. cites 9 E. 4. 2.

cap. 15. f. 8. cites S. C. and 21 H. 6. 3. — 2 Inst. 670. S. P. and cites S. C. but a nuper may be of the town, &c. because men often change their habitation; and this distinction appears by the act itself by the words relating to towns and hamlets (viz. where they were, or are.)

Where a person makes a writing by name of parson of D. and after is made parson of S. the writ shall be parson of S. late parson of D. Br. Variance, pl. 35. cites 12 H. 4. 5. — Br. Brief, pl. 126. cites S. C.

So of bishop of L. translated to W. the writ shall be bishop of W. late bishop of L. per Hank. Ibid. — Br. Brief, pl. 126. cites S. C.

And a writ was brought against one by name of *A. D. of Sbene* in the county of Middlesex, nuper de Aviden, and it was held good by Newton, and that the plaintiff may maintain the one or the other. Thel. Dig. 56. lib. 6. cap. 14. f. 17. cites Pasch. 19 H. 6. 16. But it was said there that the nuper is void.

\* Br. Nof-  
me, pl. 56.  
S. P. ac-  
cordingly,  
and says it  
appears  
often.

6. Where one has cause to have action against any who was \* sheriff or collector by reason of his office, he ought to name him nuper sheriff, or nuper collector in his writ. Thel. Dig. 51. lib. 6. cap. 4. f. 4. cites Trin. 15 E. 4. 27. where it was said that a collector shall not remain collector but only till the day which he has to pay the money into the receipt, and that his authority is determined after this day.

7. Trespass against *J. N. of B. late parish clerk*; per Mordant, addition ought to be certain, and it may be that he was parish clerk, and is not so now; per Fairfax, late of B. is good, but late parish clerk

clerk is not good; per Husley, *late yeoman* is not good, and so here, and so was the opinion of the court. Br. Additions, pl. 62. cites 22 E. 4. 13.

(G) Names of Office.

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1. **I**T was held, that *master of an hospital* is a name of dignity, and where land is demanded against him, he ought to be named by name of his dignity. Thel. Dig. 50. lib. 6. cap. 3. f. 3. cites Hill. 2 E. 3. 47.

But it was adjudged, that a writ of *scire facias* out of a fine of a

*manor* should be good notwithstanding that the tenant said that he was master of an hospital not named, &c. because the thing named *hospital* was the same manor, and the intent of the plaintiff was to defeat all the estate of the tenant. Thel. Dig. 50. lib. 6. cap. 3. f. 3. cites Hill. 2 E. 3. 47. and 7 E. 3. 328.

2. If a man has a name of dignity, and be ousted by him who has colour to oust him of his dignity, as by the ordinary, though it be by deprivation not duly made, there he ought to sue to have restitution of his dignity before that he name himself by his name of dignity, &c. otherwise it is if he be ousted by other, &c. Thel. Dig. 51. lib. 6. cap. 3. f. 15. cites 13 Ass. 2. per Parning.

Warden of a chapel who brings assise against him who has no colour of title, shall have assise by the name

of Warden, and contra against him who ousts him by colour, as the ordinary by deprivation. Br. Nofme, pl. 37. cites 13 Ass. 2.

3. In action real brought by a prebendary of land of his prebend, he ought to name himself prebendary in his writ, otherwise it shall abate. Thel. Dig. 36. lib. 3. cap. 5. f. 1. cites Mich. 13 E. 3. Brief 675.

4. But in assise by a chaplain brought by one who holds it of the collation of the king, the writ shall not abate notwithstanding that he was not named by name of parson, or master, or chaplain, &c. because the writ [is] for all the gross of the chapel, and because it did not appear that there had been any institution. Thel. Dig. 36. lib. 3. cap. 5. f. 2. cites Trin. 13 E. 3. Brief 265. 13 Ass. 2.

Assise is brought against J. S. without naming him custos of the chapel of D. and well though it

be of the land of the chapel; for the action is to disprove his interest. Br. Nofme, pl. 68. cites 10 H. 7. 18, 19.

5. Assise by J. S. who was at issue, and the assise found that the land was of the prebend of the plaintiff he not named prebendary, and therefore the writ was abated, though it was not pleaded; and so see that where the title arises by the name as Prebendary, Prior, Parson, Bishop, &c. he shall be named by the same name, &c. Br. Nofme, pl. 52. cites 13 Ass. 11.

6. Warden of a chapel in assise was not named warden, but he pending the assise resigned, and the plaintiff recovered. The successor reversed the judgment by writ of error, because his predecessor was not named Warden; quod nota. Br. Nofme, pl. 38. cites 15 Ass. 8.

Br. Error, pl. 111. cites S. C.

7. Writ may be brought against one who is provost without naming him provost, where nothing is demanded in right of his provostry. Thel. Dig. 51. lib. cap. 3. f. 14. cites Hill. 17 E. 3. 1.

8. Thel.

8. Thel. Dig. 37. lib. 3. cap. 5. f. 4. says it seems by the opinion of Trin. 2 H. 4. 23. that a *chaplain of a chantery* may maintain writ of trespass de parco fracto and assault, &c. *without naming himself chaplain of the chantery where he had distrained for services due by reason of his chantery.*

Thel. Dig.  
50. lib. 6.  
cap. 3.  
cites S. C.

9. Where *Quare impedit*, &c. is brought against a prior or parson, he shall not compel the plaintiff to name him prior or parson, because by this suit he is to defeat the name for ever. Br. Nofme, pl. 16. cites 14 H. 4. 36.

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10. It was said that the *treasurer*, nor the *chancellor*, nor no officer shall be named by his name of office, &c. Thel. Dig. 36. lib. 3. cap. 4. f. 1. cites Mich. 7 H. 6. 16.

Br. Brief,  
pl. 158.

cites 7 H. 6. 34. S. P. accordingly. But ibid. cites 23 E. 3. contra as said there in *Quare impedit*, and 25 E. 3. in *præcipe quod reddat*.

• Br  
Nofme,  
pl. 53.  
cites S. C.  
according-

11. Writ brought by name of Jo. *Magistri sive custodis de B.* is good. Thel. Dig. 38. lib. 3. cap. 9. f. 8. cites Mich. \* 8 E. 4. 19. and that so agrees 7 H. 6. 14.

ly.—But it seems that this is misprinted and should be 8 E. 18. b. pl. 26. where the writ was to answer the master or warden of B. [in the disjunctive.] It was objected that the plaintiff ought to elect one of the said names; for that he cannot have both, &c. Sed non allocatur. For per cur. all the words made only his name.

12. For an annuity issuing out of the prebend of Ovington, being annexed to the precentor in the cathedral church of E. the writ of annuity may be brought against him by name of prebendary, without naming him precentor; for this is no dignity per opinionem. Thel. Dig. 50. lib. 6. cap. 3. f. 8. cites 14 H. 6. 14.

Thel. Dig.  
57. lib. 6.  
cap. 15. cites  
S. C. and  
S. P. ac-  
cordingly.

13. Per Paston and Newton, *king's serjeant, cook, &c.* who are *esquires* there, may be named *esquires*, or by their *misteries*, as *cook, &c.* and the one and the other shall be sufficient. Br. Additions, pl. 14 H. 6. 15.

14. Where a precentor in a cathedral church has a prebend annexed to his precentorship, if he be to bring *Quare impedit* of his prebend, he ought to name himself precentor. Thel. Dig. 37. lib. 3. cap. 5. f. 5. cites 14 H. 6. 14.

Debt was  
maintain-  
able against  
a warden  
without  
naming  
him war-  
den. Br.

15. It was adjudged that a writ of debt brought against one being warden of the Fleet, for letting a prisoner go at large without naming him warden should be good. Thel. Dig. 51. lib. 6. cap. 4. f. 1. cites Mich. 11 E. 2. Dette 172. And that so agrees Mich. 18 E. 3. 35. But says see that the contrary is said Pasch. 21 E. 4. 27. and Mich. 22 H. 6. 25. also.

Nofme, pl. 56. cites Fitzh. Debt. 173.

It appears  
often that  
where ac-  
tion is  
brought a-  
gainst an

16. A man shall have writ of debt against one who is ordinary without naming him ordinary in the writ; but it suffices to say, *Ad cujus manus bona, &c. devenerunt.* Thel. Dig. 51. lib. 6. cap. 4. f. 3. cites Hill. 35 H. 6. 42.

ordinary, &c. by his office, that he shall be so named in the action against him. Br. Nofme, pl. 56.

17. Bill brought against the *custos brevium in C. B.* by the name

of *Custodis brevium in banco regis* is good, and not to say in comuni banco. Thel. Dig. 51. lib. 6. cap. 4. f. 5. cites 39 H. 6. Brief 141.

18. An attorney of the Common Pleas by general writ of debt may sue for money paid by him in the suit of the defendant without naming him attorney. But if he sues a bill by privilege of the place, he ought to name himself attorney. Thel. Dig. 36. lib. 3. cap. 4. f. 2. cites Mich. 3 E. 4. 29.

In writ of debt by attorney or servant, he need not be named attorney or

servant in the writ, but may declare it in the declaration. Br. Nofme, pl. 44. cites 3 E. 4. 29.

19. And so it shall be of the warden of the Fleet. Thel. Dig. 36. lib. 3. cap. 4. f. 2. cites Mich. 9 E. 4. 43.

20. Note, where mayor, steward, or such like, is coroner, and takes indictment before J. B. mayor or steward, upon view of the body, and does not say coroner, it is error; for there is no authority. Br. Nofme, pl. 50. cites 22 E. 4. 12.

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21. If a deanry be dissolved by act of parliament, and writ is brought after against the late dean by name of dean, the writ shall abate. Thel. Dig. 50. lib. 6. cap. 3. f. 10. cites Pasch. 4 H. 7. 6. Per Brian.

22. In writ of rescous brought by one Wells, Knt. it was pleaded that he was sheriff, not named sheriff, &c. and it was held a good plea. Thel. Dig. 36. lib. 3. cap. 4. f. 4. cites Hill. 6 H. 7. 14.

23. D. being indicted for striking in a church-yard, pleaded that he was by the queen's patent created Garter King of Arms, and demands judgment, because he is not so named; and because it was a name, parcel of his dignity, and not of his office only; for the patent is, Creamus, Coronamus & Nomen imponimus de Garter Rex Heraldorum, and therefore in all suits against him, he is to be named by this name. For this cause he was discharged of the indictment. Cro. E. 224. pl. 7. Pasch. 33 Eliz. B. R. Dethick's case.

24. In an action against D. by the name of D. alias Garter, the defendant demanded judgment of the writ, because he was created *Principalis Rex Armorum*, and ought to have been so stiled. The court were divided whether the writ should abate or not; some being of opinion, that when an office is granted to one by patent, there, for any thing concerning the same, he ought to be named as in the patent; but if he is sued in his natural capacity, he may be called by his proper name; but others held, that this being a name of dignity it is become parcel of his name, and so must be used in all actions. Adjournatur. Ow. 61. Hill. 29 Eliz. Clarentius v. Dethick,

Cro. E. 542. pl. 8. Popham and Gawdy held, that the suit being against him as a private person, it was sufficient to name him by his proper name;

but Fenner contra. Et adjournatur.

25. Bill in the Star-chamber abated, because it was brought against Sir G. Crook only, without addition of his office, and dignity of judge. Mar. 77. pl. 119. cited by Jones, Trin. 16 Car. to have been adjudged in a bill in the Star-chamber, in Justice Crooke's case.

## (H) As to Town Hamlet, Parish, &amp;c.

1. *APPEAL* was brought of an *aft* done in the parish of *St. Martin* at Charing-Cross in Middlesex, and there it is agreed, that if the place be in a vill, it shall be expressed in the vill, without mention of the parish; and if it be in a parish or forest, as *Sherwood*, &c. which are out of any vill, then it shall be expressed of the parish or vill. *Quod nota.* Br. Additions, pl. 19. cites 7 H. 4. 27.

The. Dig.  
56. lib. 6.  
cap. 14. f.  
23. cites  
S. C. ac-  
cordingly;  
and also  
cites 7 H. 6.  
5. 8. 19 H.

2. Debt against *J. S. of Gate*, executor of *W. P.* The defendant said, that there is *East-gate* and *West-gate* within the same county, *absque hoc* that there is *Gate* only; and per *Martin*, and the best opinion, he may say that No such vill within the same county; for parcel of the name is not the whole name, as *Ingle* and *Inglewood*, &c. *Quære.* Br. Additions, pl. 1. cites 3 H. 6. 8.

6. 35. 10 H.

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6. 27. 21 E. 4. 37. and 10 H. 7. 4. — A. gives bond to B. by the name of *A. of Dale*, without addition. B. sues A. upon this bond. A. shall not be received to plead *Overdale* and *Netherdale*, and that there is no *Dale* without addition; for the bond is otherwise; and A. shall not be received to deny his own deed, but shall be estopped by it. *Jenk.* 163. pl. 12. cites 2 R. 3. *Fitzh.* Estoppel 181.

2 Inst. 669.  
S. P. and  
cites S. C.

3. In writ brought against a baron and his feme, or against an abbot and his commoign, he need not shew of what vill or place the feme or commoign are; for the feme is supposed and intended to be of the same place as the baron is, and so of the commoign. *The. Dig.* 55. lib. 6. cap. 14. f. 6. cites *Hill.* 3 H. 6. 31.

4. Where one is supposed to be of *Dale*, it is no plea for him to say, that at the day of the writ purchased he was *conversant* at another vill, without saying and not at *Dale*, &c. *The. Dig.* 56. lib. 6. cap. 14. f. 11. cites *Mich.* 4 H. 6. 4. and that then the plea is good, and cites *Hill.* 8 H. 6. 26. *Mich.* 10 H. 6. 5. and *Mich.* 19 H. 6. 1.

2 Inst. 669.  
S. P. and  
cites S. C.  
that he  
cannot be  
named of  
B. only;  
for there  
is no such  
town.

5. Indictment of trespass against *J. N. of B.* It seems that he was outlawed, upon which a writ of error was brought, and assigned for error, That there is in the same county *B. Magna* and *B. Parva*, and none without addition. Per *Hales*, If there be such vill as *B.* with addition, then there is such a vill as *B.* But the opinion of the court was, that it shall be reversed. Br. Additions, pl. 23. cites 7 H. 6. 39.

2 Inst. 669.  
S. P. and  
cites S. C.

6. In writ brought against a parson, it is a good addition to say *præcipe J. K. Rectori ecclesiæ de T.* in such a county, without saying of what place he is, notwithstanding that he be parson of 2 several churches in the same county; for he shall be intended and adjudged resident in both. *The. Dig.* 55. lib. 6. cap. 14. f. 7. cites *Mich.* 7 H. 6. 1. and *Mich.* 10 H. 6. 8. But otherwise it is of a lord of 2 manors.

7. Maintenance against *J. N. of B.* who said that the day of the writ purchased he was dwelling at *S.* &c. and no plea; for process of



of outlawry does not lie in this case. Br. Additions, pl. 28. cites 8 H. 6. 36. 37.

8. And it was held by Strange, that it is sufficient to *traverse that he was not there conversant the day of the writ purchased*, without saying Nor ever after; but Martin held the contrary. Thel. Dig. 56. lib. 6. cap. 14. f. 12. cites Mich. 8 H. 6. 9. and that so agrees Mich. 2 E. 4. 15.

9. Such a writ was adjudged good, *Præcipe T. Chace, cancellario universitatis Oxon' in comitat' Oxon, &c.* without saying *de Oxonia*, because he shall be intended abiding at Qxon. Thel. Dig. 56. lib. 6. cap. 14. f. 13. cites 8 H. 6. 38.

2 Inst. 669.  
S. P. accordingly.

10. Debt against *J. S. parson of D.* who said that he was abiding at S. and not at D. & non allocatur; for he shall be intended to dwell there, because he is bound to be resident there, by which he said that he had another benefice, and yet non allocatur. Br. Brief, pl. 401. cites 10 H. 6. 8.

11. Debt against *J. N. of C.* if he says that he was and is abiding at H. and not at C. it is a good replication that H. is a hamlet; for then it is sufficient to name him of the principal vill, by which the other said that H. is a vill by itself. Br. Brief, pl. 402. cites 10 H. 6. 12.

12. Maintenance against *J. S. of D.* who said that he was never abiding at D. and did not shew of what vill he was; and a good plea, and yet exigent does not lie in this action; but where the defendant is so named, he may plead as above for misnomer by the common law. Quod nota. Br. Brief, pl. 403. cites 11 H. 6. 11.

13. Where one was supposed to be of Catesby, he said that he was abiding at Catesby-corbet, and not at Catesby, without addition; and held a good plea, without saying that Catesby is a vill by itself, and Catesby-corbet another vill by itself. Thel. Dig. 56. lib. 6. cap. 14. f. 14. cites 14 H. 6. 24.

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14. Where a man is impleaded by name of *J. B. of C.* which is a vill in Wales, it is good. Br. Additions, pl. 32. cites 21 H. 6. 3.

15. Decies tantum against *J. N. of B.* who said, that the day of the writ purchased, and always after he was conversant and dwelling at S. and not at B. Judgment of the writ; Per Moyle, process of outlawry does not lie in this action, therefore no plea; but Newton and Paston J. to the contrary, and that it is commonly done at common law; for there a man was not compelled to give addition, but if he gives false addition the parties shall have exception to it; Moile bid them maintain the writ; quod nota. Br. Additions, pl. 36. cites 21 H. 6. 54.

Br. Nugat-  
tion, pl. 14.  
cites 21 H.  
6. 52. S. P.  
by Newton,  
and Paston.

16. Where one is named *J. S. of Dale*, and is abiding at Sale, the writ shall be brought against him by name of *J. S. of Dale of Sale, &c.* per Ascue. Thel. Dig. 56. lib. 6. cap. 14. f. 18. cites Trin. 21 H. 6. 59.

17. Debt against *J. B. of C. in the parish of S.* Arderne demanded judgment of the writ; for in the same parish are 2 vills, viz. C. and B. and that the day of the writ purchased he was con-

2 Inst. 669.  
S. P. and  
cites S. C.  
—Debt  
versant

against  
W. C. of  
the parish  
of St. Cle-  
ments in  
the county  
of Middle-  
sex, exe-  
cutor of the  
testament  
of C. B.  
and so see  
that of the

versant and dwelling at B. and not at C. Judgment of the writ, and a good plea by award. Ashton said, all which is in one parish is not but hamlets to the principal vill, which all the court denied; for in one and the same parish are 2 vills in several places. And per Mark. & Port. J. \* *where no vill is in a parish*, there the writ is good, Præcipe J. N. of such a parish, &c. For the statute is, that he shall be named of the vills, hamlets, places, or county where they inhabit, or were conversant. Br. Additions, pl. 38. cites 22 H. 6. 41.

parish is a good addition where there is no vill. Br. Additions, pl. 52. cites 1 E. 4. 2.

\* Where the parish is a vill by itself, the addition of parish is good. Thel. Dig. 56. lib. 6. cap. 14. f. 20. cites Mich. 4 E. 4. 41. Pasch. 5 E. 4. 20. 125. Pasch. 22 E. 4. 2. and Hill. 22 H. 6. 47.

But if there be but one vill in the parish, and it is known by the name of the vill, and of parish, there it is sufficient to name him of the vill, or of the parish, at his will. Br. Brief, pl. 334, (337.) cites 5 E. 4. 125.

Contra where there are 2 or more vills in the parish. Ibid.

Addition of  
a hundred  
or soken,  
which have  
divers vills,

is not a good addition. Thel. Dig. 56. lib. 6. cap. 14. f. 20. cites Mich. 4 E. 4. 41. Pasch. 5 E. 4. 20. 125. Pasch. 22 E. 4. 2. and Hill. 22 H. 6. 47.

18. Debt. A man shall not be named of a hundred, nor of wa-pentake or riding, but of a vill, nor of the parish where divers vills are, but of a vill there. Br. Brief, pl. 476. cites 22 H. 41, 42.

19. It was agreed that against persons who are of a city which is a county of itself, as London, Bristol, &c. it suffices to say, Præcipe tali pannario de London, without saying of what ward, parish, or street he is. And note there that the addition of mystery is before the county. Thel. Dig. 55. lib. 6. cap. 14. f. 8. cites 27 H. 6. 4-4 E. 4. 10. and 5 E. 4. 142.

S. P. per  
Newton  
Ch. J. Br.  
Brief, pl.  
173. cites  
19 H. 6. 1.  
So of the

20. Note, in deceit it was said by Danby, that if a man has house in 2 places, he shall be taken as dwelling in both places; and per Litt. the serjeants who come to the term shall be adjudged to be dwelling at London and in their country also. Br. Additions, pl. 11. cites 33 H. 6. 9.

Judges.—And where a man dwells at D. and his wife at S. he may be named of the one or of the other. Ibid.—And where a man removes from one vill to another, and goes through several vills, he may be named of any of the vills by the way till he comes where he would be, and when he is there the plaintiff may name him late of the vill where he first dwelt, or of the vill where he now dwells. Ibid.—Thel. Dig. 56. lib. 6. cap. 14. f. 14. cites S. C. by Newton, who held it for law,

[ 97 ] that where one was abiding at Dale, and after removed his habitation and family to Sale, leaving some of his infants at his house at Dale to be nursed, he shall be said abiding at Sale, and so it shall be if he leaves his bailiff to occupy his house to his use at Dale; but if he has a house in one vill with menial servants and family, and has his family abiding in another house of his in another vill, he may be supposed abiding in the one vill or the other, at the will of the plaintiff; and where he has removed his habitation intirely from one vill to another, the plaintiff may chuse to suppose him of the first vill with a nuper, or of the other without nuper, and cites 33 H. 6. 9.

22. Trespass was brought against J. S. of the parish of S. in the county of Cornwall, and the best opinion was that the writ is not good, for in one parish may be diverse vills; but it is agreed there, that debt brought in a vill or hamlet is good; for the stat. 1 H. 5. speaks of vills, hamlets, place, and county; quod nota. Br. Additions, pl. 14. cites 35 H. 6. 30.

23. But addition of a great place containing in it diverse vills is not

not good. Thel. Dig. 56. lib. 6. cap. 14. f. 21. in the short report.

24. Where one is abiding in the *Tower of London*, writ brought against him by the name of such a one of London, Gent. is not good, because the Tower is not within the franchise or county of London. Thel. Dig. 56. cap. 14. f. 21. cites Pasch. 4 E. 4. 17.

25. Trespals against T. of the parish of A. in the county of T. yeoman, who said that the vill of B. was, and is within the same parish, and he is, and was, of B. absque hoc that he was of the parish of A. & non allocatur; because he said that B. is in the parish of A. by which he said he was of B. in the parish of A. and therefore should be named of the vill, and not of the parish; judgment of the writ; & non allocatur; for it shall be intended that the parish of A. is the vill of A. by which he said, that in this parish there are 2 vills, viz. B. and S. and the defendant is, and was, dwelling at B. Judgment of the writ; by which the plaintiff imparled, for it was held a good plea where he alleges 2 vills in the parish. Br. Additions, pl. 49. cites 5 E. 4. 20.

2 Inst. 669. S. P. and cites S. C. for Non præsumitur pluralitas. — Br. Brief, pl. 334 (337). cites 5 E. 4. 125. S. P. — Addition of a parish is not good if there are more vills

than one in the same parish. Thel. Dig. 56. lib. 6. cap. 14. f. 20. cites Mich. 35 H. 6. 30.

26. Where one is supposed to be of Dale, where in fact there is not any such vill, hamlet, or place known, &c. the defendant may say that No such vill generally, &c. or that he was abiding at Sale, and not at Dale. Thel. Dig. 56. lib. 6. cap. 14. f. 22. cites Pasch. 8 E. 4. 5.

If one is abiding at a hamlet of another vill, it is at the plaintiff's election to

suppose him to be of the vill or of the hamlet. Thel. Dig. 56. lib. 6. cap. 14. f. 14. says it was agreed 14 H. 6. 24. and cites also Mich. 35 H. 6. 30. But says see 21 E. 4. 89. contra.

27. In præcipe quod reddat of land against John Bury de Kingsbury, it is no plea for him to say that he is abiding at another place, and not at Kingsbury, &c. per opinionem curiæ. Thel. Dig. 57. lib. 6. cap. 17. f. 5. cites Mich. 12 H. 6. 16. and Mich. 21 E. 4. 86.

28. Debt upon an obligation, which was J. D. of B. and the writ was J. D. of B. Underbill, and so a variance, and because a man ought to express vill or addition in the writ by the statute in action, in which process of outlawry lies; and also if there are 2 B.'s, he ought to give addition notwithstanding the obligation, and therefore well. Br. Variance, pl. 78. cites 21 E. 4. 79. 80.

29. Debt against J. S. of the parish of J. and because the statute is that he shall be named of the vill, and in one parish may be three vills, therefore ill, and the writ abated; quod nota; for he shall be named of the vill. Br. Additions, pl. 61. cites 22 E. 4. 2.

30. Where one is supposed to be of London, it is sufficient for him to say that he was abiding at another place, and not at London, the day of the writ purchased, &c. without saying Or ever after. Thel. Dig. 56. lib. 6. cap. 14. f. 24. cites Hill. 22 E. 4. Brief 944.

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31. In debt upon bond, in which the plaintiff was named J. T. of F. in the county of N. Esq; but in the count he was named J. T. Esq; only; whereupon the defendant demanded judgment of the bill. But per cur. the addition is not material, the plaintiff being well named

named in his proper name and surname; but otherwise had it been of the part of the *defendant*. Cro. E. 312. pl. 1. Hill. 36 Eliz. B. R. Thornaigh v. Disney.

32. The defendant was named in the indictment. and exigent *W. R. de com' Midd', &c. without saying of what place in com' Midd'* and for that cause the outlawry was reversed. Cro. J. 616. pl. 2. Trin. 19 Jac. B. R. Sir William Read's case.

### (I) Good, in respect of the Place of its Insertion.

2 Inst. 669. S. P. says, that in case of the lesser nobility, and all others under them, the town and county are named before the addition; as Th. C. nuper de D. in com. M. Miles.

1. **N**otwithstanding that the additions of estate, degree, and mystery to be added to the names are wrote in the statute before the additions of places and counties, yet it has been used always after the making of the said statute, to put the additions of *estate, degree, and mystery after the places and counties* in all writs, appeals, and indictments against common persons. Thel. Dig. 55. lib. 6. cap. 14. f. 3.

2. But the use is otherwise in appeals and indictments of treason or felony against Dukes, Marquesses, and Earls; for their names of dignity are in such cases put before the additions of places and counties, as Charles Earl of Westmoreland, late of Branspeth in the county of Durham. Thel. Dig. 55. lib. 6. cap. 14. f. 4.

Jo. C. nuper de D. in com. M. Armiger. N. C. nuper de D. in com. M. Merchant, &c. But that in case of appeals, &c. of treason, &c. against the greater nobility, the order of the statute is pursued. And says that so it is when any other person is named of a city and county of itself, the like order is observed; as J. S. Pannareus de London in com. civitatis London.

3. In writ brought against a feme in such a manner, viz. *præcipe Margeriae, who was wife of T. Green of Norton-Davy, &c.* It was held that the addition is good, and that this vill of Norton shall be referred to the defendant, and not to T. Green. Thel. Dig. 55. lib. 6. cap. 14. f. 9. cites Mich. 4 H. 6. 4.

4. In action against heir or executor, by name of W. S. these words *heir or executor* ought to be put in the premisses of the addition, and not in the *alias dictus*; for if it be otherwise, the writ shall abate by award. Quod nota. Br. Additions, pl. 65. cites 30 H. 6. 5.

2 Inst. 669. S. P. and cites S. C. For the proper use of an alias dictus is to agree with the record

5. The additions by the statute 1 H. 5. 5. shall be always put to the first name, and not to the *alias dictus* of the defendant. Thel. Dig. 56. lib. 6. cap. 14. f. 19. cites Hill. 32 H. 6. 33. and 36 H. 6. 30. For no part of the *alias dictus* is traversable. Ibid. and Trin. 30 H. 6. 6. Mich. 5 E. 4. 42. and Hill. 21 E. 4. 18. and 1 E. 1. Pasch. 4 E. 4. 10.

or specialty on which the writ is grounded.—S. P. For the *alias dictus* is only reputation, and is not the truth. Jenk. 119. pl. 40.

In an indictment for breaking a house, the addition, (viz. yeoman) was after the *alias dictus*, and therefore ruled to be ill. Cro. E. 583. pl. 12. Mich. 39 & 40 Eliz. B. R. Fulle's case.

Debt was brought in an inferior court against R. P. of, &c. in com. N. husbandman, and judgment for the plaintiff. It was assigned for error, That the addition was in the *alias*, and so not good; but per cur. The court of N. had no authority to outlaw any man, so that an addition is not requisite, and therefore it is no error; and judgment was affirmed. Ow. 58. Hill. 38 Eliz. Hund v. Preston.—Mo. 354. pl. 478. S. C. adjudged accordingly.

The addition in an indictment was J. L. alias S. of D. and held ill, it not being before the alias dictus. Cro. E. 249. pl. 11. Mich. 33 & 34 Eliz. B. R. LEEK's case; and says it was so ruled in GAYNES's case, although both the names were not recited in the alias.

Where one is sued by a name with an alias, the addition must be expressed after the first name. Vent. 13. Pasch. 21 Car. 2. B. R. a nota there.

6. Appeal against J. C. alias dictus J. M. late of B. in the county of E. Yeoman, and the best opinion was that the writ is good; for all that ensues the alias dictus shall have relation to the first proper name and surname, and it was said, that in the time of Prisot, \* in debt præcipe A. C. Clerk alias dictus A. C. late of B. in the county, &c. Clerk, was abated, because addition of no vill was before the alias dictus; but per Nedham J. it was reversed after by writ of error in B. R. before Fortescue, which Brook says seems not to be law. Br. Additions, pl. 51. cites 5 E. 4. 141.

Thel. Dig. 57. lib. 6. cap. 15. f. 14. cites S. C. & S. P. accordingly. — \* Debt against J. S. Panner of London, alias dictus J. S. of London,

Draper, and the writ was abated by judgment; for he may be Panner of London, and dwell at York, and the alias dictus in the addition is not good, but to agree with specialty; for the addition ought to be in the premises, and not in the subsequent. Br. Additions, pl. 46. cites 36 H. 6. 28.

9. But where one was indicted by name of J. S. Servant to Jo. at Noke, in the county of M. Butcher, it was held that the addition was not good, because butcher shall be referred to Jo. at Noke. Thel. Dig. 55. lib. 6. cap. 14. f. 10. cites Hill. 9 E. 4. 50.

So where one was indicted by name of Jo. Hind, son of Jo. Hind of

T. &c. Baker, because baker shall be referred to the father; but says that those cases vary from the said case of 4 H. 6. For there it cannot be intended but that the Baron is dead; and in the other cases the master and father shall be intended to be alive. Thel. Dig. 55. lib. 6. cap. 14. f. 10. cites it as adjudged Mich. 6 E. 4. 3.

10. A man was indicted by name of J. S. Servant of J. N. alias dictus J. H. of B. in the county of Middlesex, Butcher, and because Servant is no addition, and Butcher shall be referred to J. H. and not to J. S. who was indicted, therefore the defendant was put sine die. Br. Additions, pl. 42. cites 9 E. 4. 48.

A. was indicted for the murder of M. his wife; for that the said M. was

in pace domini regis quousque the aforesaid A. husband of the aforesaid M. of H. aforesaid, in the county aforesaid, yeoman, &c. It was a doubt whether the additions of the vill and the word Yeoman shall refer to A. or M. because Ad ultimum antecedens fiat relatio. But the better opinion was, that the indictment was good enough, and could not be intended to refer to M. but to the husband. D. 46. b. pl. 2. Pasch. 31 & 32 H. 8. Guyer's case.

11. H. was indicted upon the statute of 8 H. 6. of forcible entry, and exception was taken to the indictment in default of addition of the place, &c. because in this case the addition was, after the alias dictus, and so there is no addition; and therefore the party was discharged. 2 Le. 183. pl. 224. Mich. 32 Eliz. B. R. Hooper's case.

Cro. E. 198. pl. 15. S. C. the indictment was held void, because the addition

was after the alias dictus.

12. An indictment was for a riot against A. B. C. D. E. &c. and J. S. of H. Yeoman. It was objected that there was no addition of the place, where the parties indicted did dwell, for that the place of H. is only for J. S. the last party named, but no addition of any place for the rest, and therefore prayed that the indictment might be quashed. Williams J. held that the word (Yeoman) goes to all, reddendo singula singulis, but that the place here named of H. doth not go to all, but to the last man named; and for this default



the indictment was quashed. Bullst. 183. Pasch. 10 Jac. the King v. Hastings.

(K) Where a Person has two or more Additions, which of them he must be named by.

1. **A** Man may sue a priest who is *dean* in a writ of *trespass*, without naming him *dean*; but otherwise it is in a *præcipe quod reddat*. Thel. Dig. 36. lib. 3. cap. 3. f. 6. cites Pasch. 5 E. 3. Brief 800. and 5 E. 4. 106. and where the action is by reason that he is *dean*, cites 14 H. 6. 14.

But such a case was left in doubt, 22 E. 4. 43. Ibid.

2. Debt by a prior against an abbot who was parson *imparsonce* upon composition had between their predecessors that the abbot shall have the tithes of B. and shall pay an annuity of 10l. per annum to the prior and his successors, and the abbot was not named Parson; and yet well by the opinion of the court, inasmuch as it arises by the said composition of later time. Br. Nofme, pl. 54. cites 14 E. 4. 4.

3. Where the same person is both a bishop and dean, yet in all cases which concern the lands of the dean, he shall be stiled dean in actions. Per Doderidge J. Lat. 235. cites 19 E. 3. Fitzh. Trial, 57.

Affise by a prior, and made title to earn as parson of R. and because he was not named parson of R. the writ shall abate; per opinionem. Br. Nofme, pl. 13. cites 22 H. 4. 20.

4. It was adjudged that a prior being parson of a church, may maintain writ of account without naming himself parson, against his bailiff, of the profits of this church. Thel. Dig. 36. lib. 3. cap. 5. f. 3. cites Hill. 30 E. 3. 1.

5. A prior being parson of another church cannot sue affise of a thing appertaining to this church without naming himself parson. Thel. Dig. 37. lib. 3. cap. 5. f. cites Pasch. 12 H. 4. 20. And says that so it seems to be agreed in writ of waste, Mich. 10 H. 7. 5. And that so it is in annuity, Mich. 18 E. 4. 17.

6. Quare impedit by the king against the bishop of N. and J. E. monk, who said that he is prior of W. not named prior; judgment of the writ, and because the action is of presentation to this same priory, and so to defeat it, therefore no plea. Br. Brief, pl. 427 (430.) cites 14 H. 4. 37.

7. So of a parson, where the action is of his parsonage. Ibid.

(L) New Additions pending the Writ. The Effect thereof.

If the dignity of earl descends to the plaintiff pending the writ, his writ shall not abate. Thel. Dig. 185. lib. 12. cap. 16. f. 6. cites Hill. 32 H. 6. 34.

1. **I**N writ against an earl, he ought to be named earl notwithstanding that he be not held or known for an earl the day of the writ purchased, if in truth he be an earl. Thel. Dig. 50. lib. 6. cap. 3. f. 6. cites Trin. 5 E. 3. 199. and says see 22 Aff. 24.

2. A writ



2. A writ by one *W. Clynton and A. his feme*, was not abated notwithstanding that the *baron was made an earl after the writ purchased*, and the suit was for a thing in right of the feme, and not in right of the earl, &c. Thel. Dig. 36. lib. 3. cap. 3. f. 12. cites Pasch. 13 E. 3. Brief 259.

And ibid. f. 13. says that so agrees Pasch. 19 E. 3. procedendo 2. And that

his writ shall not abate, if he becomes an earl by descent pending, &c. 32 H. 6. 35.

And where an earl is made a duke pending the writ, the writ shall not abate, but he shall proceed and shall count by name of Earl. Thel. Dig. 36. lib. 3. cap. 3. f. 13. cites Pasch. 25 E. 3. 39. And that so agrees Mich. 22 R. 2. Brief 936. and Pasch. 24 E. 3. 14.

3. In writ of annuity by *W. E. master of such a house*, the defendant said, that after the last continuance the plaintiff was chose and confirmed bishop of *W.* &c. without saying that he is bishop by creation, yet the writ was not abated. Thel. Dig. 185. lib. 12. cap. 16. f. 2. cites Hill. 26 E. 3. Brief 250. and says see 24 E. 3. 17. 26. 19 E. 3. Procedendo 2, & 9 H. 5. 13. and Mich. 4 H. 4. 2.

4. But in writ of assise by a prior it was pleaded that he was made abbot of the same place, at his own suit, by the pope and the king pending the writ, by which the intent of the court was to abate the writ. Thel. Dig. 185. lib. 12. cap. 16. f. 3. cites Mich. 22 R. 2. Brief 936. and 2 R. 3. 20. and 4 H. 4. 2.

5. Debt against *E. executor of the testament of J. N. esq.* Exception was taken that the said *J. N. was a knight the day of his death*, and therefore it ought to be executor of the testament of *J. N. knight*; judgment of the writ; and therefore the writ was abated, and yet the obligation was *esq.* also; quod nota. Br. Brief, pl. 517. cites 7 H. 4. 7.

Br. Nofme, pl. 10. cites S. C. and S. P. accordingly, and says that a man may be named a

knight as soon as he is baptized, and then he never shall be esquire.—Br. Additions, pl. 17. cites S. C. accordingly, and yet it was the name of the testator and not of the defendant. Thel. Dig. 50. lib. 6. cap. 3. f. 7. cites S. C. and S. P. accordingly.

6. Two men recovered damage in assise, and the one is a knight and the other not, and after the other is made a knight, and both brought scire facias to execute the recovery, by name of *A. B. Miles*, and *T. B. modo Miles*; and it was held that it ought to be which *A. Miles* and *T. modo Miles* by name of *A. B. Militis*, and *T. B.* recovered; quod tota cur. concessit. Br. Pleadings, pl. 169. cites 11 H. 7. 25.

7. In trespass, the defendant was knight the day of the writ purchased, not named knight, and therefore by exception of the party the writ abated. Br. Nofme, pl. 15. cites 14 H. 4. 21.

8. *J. E.* was indicted of felony by the name of *J. E. yeoman*, and the king pardoned him, by the name of *J. E. gentleman*, all manner of felonies. This pardon may be pleaded, with averment that *J. E. yeoman*, and *J. E. gentleman*, are one and the same person; for at the time of the indictment he might be yeoman, and afterwards be made gentleman by the king, or by reason of his office. Kelw. 58. a. pl. 1. Hill. 20 H. 7. Eaton's case.

9. If the plaintiff be made a knight after the last continuance, the writ shall abate by judgment. Thel. Dig. 185. lib. 12. cap. 16. f. 4. cites 7 H. 6. 15. 40.

10. In debt the defendant was outlawed by name of gentleman, and

and was taken by *capias utlagatum*, and said that at the time of the outlawry he was *merchant, and not gentleman*; to which the plaintiff, upon *scire facias*, came and pleaded his obligation for estopple, in which he was *bound by name of gentleman*. To which it was said, that it is no estopple; for it may be that he was gentleman at the time of the obligation made, *by reason of his office*, and at the time of the suit was out of the office; therefore quare. Br. Estopple, pl. 11. cites 28 H. 6. and see 9 E. 4. 29.

11. If the *archbishop of York* brings writ, and is *made archbishop of Canterbury after the last continuance*, the writ shall abate. Thel. Dig. 185. lib. 12. cap. 16. f. 5. cites Mich. 32 H. 6. 12.

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Br. Vari-  
ance, pl. 76.  
cites S. C.  
and that the  
parol was  
sine die by

12. *Replevin was without day after issue tried by nisi prius, and the defendant, for whom the verdict passed, was made knight after, and then sued scire facias to have judgment and return upon the verdict, which agreed with the first record, and did not name himself knight; and yet well by several, because it is only to revive the first suit.* Br. Nofme, pl. 42. cites 5 E. 4. 15.

demise of the king, and afterwards he was made a knight; and held that he need not name himself knight, for the reason here given; and the plea and judgment shall be upon that, and upon the first record, and not upon the *scire facias*, especially where it is brought by the defendant; for making the defendant knight shall not abate the writ. Contra of the plaintiff.——Br. Brief, pl. 327. cites S. C. but says it was said by some that in replevin, Quare impedit, and detainee, upon garnishment, the defendants and garnishee are actors, and therefore if they are made knights pending the suit, and before their bringing writ to revive, or *scire facias*, they shall be named knights. Et adjournatur.

Where one recovers by name of J. S. *esq.* and after is made a knight, he ought to sue *scire facias* by name of knight. Thel. Dig. 36. lib. 3. cap. 3. f. 18. cites Pasch. 5 E. 4. 19.

13. In writ brought by an officer, and by name of officer, it is a good plea for the defendant to say that he was *not officer at the time, &c.* Thel. Dig. 36. lib. 3. cap. 4. f. 3. cites Mich. 12 E. 4. 8. and 4 E. 4. 6. & 10.

In debt on  
bond, the  
defendant  
pleaded,  
that puis  
darreign  
continu-

14. 1 E. 6. cap. 7. f. 3. *Albeit any demandant or plaintiff shall be made duke, archbishop, marquess, earl, viscount, baron, bishop, knight, justice of the one bench, or the other, or serjeant at law, depending the action, yet no writ or suit shall, for such cause, be abateable.*

ance the plaintiff was made a *baronet*. If this were a dignity known at the time of making the statute, then the court held it to be out of the statute, it not being therein mentioned; but they doubted whether if it were a dignity created after the statute, the statute should in equity extend to it. But the same being only pleaded in abatement of the writ, and so it would only be a *respondeas ouster* if adjudged for the plaintiff, it was agreed to bring a new original; and so no judgment as to this point. Cro. C. 104. pl. 5. Hill. 3 Car. C. B. Bennet's case.——Litt. Rep. 81. Bennet v. Lawrence S. C. and Richardson said, that admitting it a notorious dignity at the making the statute, and it be not named, it will not be within it; and though it be named in several places before, yet that was occasioned by misprinting of baronets for barons, *quod alii iudicarii concesserunt*, and if reciting particular dignities would exclude dignities known, a fortiori it would exclude dignities made afterwards, and Crooke demanded if *viscountess* or *baroness* were within the statute, to which the others answered that they were not; and all the court said, that it [*baronet*] was not within the statute, nor was any new dignity. &c.

A *knight of the Bath* was held to be within this statute, and that so are all other knights, but a *baronet* is not unless he be knight also. Sid. 40. pl. 4. Pasch. 13 Car. 2. B. R. Heath v. Pager.

Note, Where any such creation is made pending the action, there must be an entry on the roll, with a *profful: inam continuationem*, viz. such a day the king by his letters patents under the great seal of Great Britain, bearing date the same day, &c. and so set forth the patent with a *profful: in curia* of it, and a *quod predictus* the defendant *hoc non deducit*. L. P. R. 2.

Noy 86.

15. If I make J. S. my attorney, and (the warrant of attorney still

still continuing) he is *made a knight*, yet is not the warrant of attorney determined, although the word (knight) which is now part of his name, be not in the warrant; per Brown. Ow. 31. Mich. 1 & 2 Eliz.

S. C. accordingly, and says it was so adjudged 35 H. 6.

So if commission of *nisi prius* be directed to J. S. esq; and before the trial he is made knight, the return may be coram J. S. Milite, and of the justices, &c. Lat. 161. Petty v. Hobson.—For both the additions are become *consistent*, by reason of the difference of times. 10 Mod. 285. in case of Nutton v. Crow.

16. George Greisley entered into a *statute merchant*, by the name of George Greisley, esq; and was afterwards created a baronet; and a *capias* was issued out against him by the name of George Greisley, esq; as named in the statute; but the court advised him to sue a new writ thus, *Capias corpus Georgii Greisley, mil' & baronetti qui per nomen G. G. ar' recognovit, &c.* Hob. 129. pl. 168. Greisley's case.

The declaration in such case shall be against J. S. esq; alias dictus J. S. Miles. Bulst. 216. per Yelver-

ton J. Trin. 10 Jac.——S. P. and S. C. cited G. Hist. of C. B. 179. for the declaration, as is said, must shew the cause of complaint as it is, and therefore must in all things follow the obligation, and the intent of the alias is only to shew he has been differently called from the name in the obligation, and therefore if one obliges himself by the name of J. S. Esq; and afterwards he is made a knight, the plaintiff cannot declare against J. S. Kot. alias J. S. Esq;

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against J. S.

## (M) Want of Addition. The Effect thereof.

1. **I**N assise against J. N. clerk, the assise found that he was a prebendary not named prebendary, and this land is in right of the prebend, where it was not pleaded; and for this the assise abated. Br. Verdict, pl. 72. cites 13 Ass. 12.

2. If the addition be ill, or left out in the original, it is not good; and where addition is not good, and the party appears and pleads, or is outlawed, yet the original is not good, and this and the outlawry shall be reversed; per Markham and other justices. Br. Additions, pl. 50. cites 5 E. 4. 3. 2.

Where the defendant is taken by *capias utlaganum*, and has not his true addition,

and this is pleaded, a *scire facias* shall be awarded against the plaintiff to maintain the addition in the writ, and if it be found with the defendant he shall be discharged; for the outlawry remains in force against him who is so named in the original. Jenk. 128. pl. 59. cites 21 H. 7. 19.

3. In trespass against J. Mylles, the defendant said that one J. Mylles was seised, and infeoffed N. which N. infeoffed J. Mylles, and after the said J. Mylles died, by which the land descended to the said J. Mylles the defendant, who entered and gave colour. Wood said the plea is not good; for there are diverse J. Mylles's, and he does not give addition to any of them; but per Vavisor, the plea is good without question; by which Wood passed over. Br. Barre, pl. 75. cites 9 H. 7. 22.

4. In a presentment before a coroner, that J. S. had certain goods of a *felo de se*, and upon process issued against him he was outlawed; but in the outlawry there was no addition given to J. S. But the whole court agreed, that as to this purpose the presentment should be accounted in law as an indictment; and afterwards

the outlawry was reversed. 2 Le. 200. pl. 201. Mich. 26 Eliz. B. R. French's case.

Cro. E. 198.  
pl. 15. S. P.  
in S. C.  
Gawdy J.  
held that  
it was not  
good; but

5. Where the husband and wife are indicted, and the *husband is indicted of such a place*, but the wife has no addition, yet the same is good enough. 2 Le. 183. in pl. 224. says it was so held Mich. 32 Eliz. B. R.

Clench and Fenner & contra.—2 Inst. 669. S. P.

6. It is not *the course to have* additions either in *informations* or in return of *rescous*. Cro. J. 531. pl. 11. 17 Jac. B. R. Gar-  
rard v. the King.

7. An indictment of *forcible entry* wanted the addition of the *county where the party dwells that made it, and also of the county where the vill lies in which the force was committed*; and upon these exceptions it was quashed. Sty. 26. Trin. 23 Car. B. R. Anon.

Lat. 109.  
S. P.—  
4 Le. 121.  
pl. 243.  
Trin. 32  
Eliz. B. R.

8. *Indictment quashed* for want of an addition; for the court said no process ought to go thereupon, because the party cannot be outlawed. Vent. 338. Pasch. 31 Car. 2. B. R. Anon.

Keene's case S. P.

9. Whether an *excommunicato capiendo* against one be void without a sufficient addition? Show. 16. Pasch. 1 W. & M. the King v. Johnson.

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\* Comyns's  
Rep. 257.  
pl. 142.  
Pasch. 3  
Geo. 1. S. C.

10. It was lately adjudged Pasch. 3 Geo. 1. in an *appeal of death* between \* REEVE AND TRUNDEL, that the want of an addition of the appellee was a good plea in abatement; and the writ of appeal was abated by such plea. 2 Hawk. Pl. C. 190. cap. 23. f. 123.

and the court quashed all proceedings upon the writ of appeal.—The indictment was by the addition of Labourer, the jury found him guilty of the murder, but found that he was not labourer. MS. Rep. 8. C.

## (N) Proceedings and Pleadings.

Thel. Dig. 57. lib. 6. cap. 17. f. 1. cites S. C. and says the plea was, that he never was of the company, and ill.

1. **W**HERE *J. N. was sued in account of his own receipt by name of J. N. of G. Company of M.* it is no plea that he is not of the company of M. Br. Nolme, pl. 17. cites 38 E. 3. 34.

2. *So of a parson.* Ibid.

3. *Contra where they are sued, by reason of this name.* Ibid.

4. One *John Baston Clerk*, is outlawed, who comes in by *capias utlagatum*; it is no plea for him to say that he is not clerk. Per cur. Thel. Dig. 57. lib. 6. cap. 17. f. 4. cites Hill. 5 R. 2. Ut-larie 43.

5. In writ of entry it was held that writ brought by name of *John, Chaplain of the chantery of our Lady of C. &c.* shall be good,

good, without shewing in what church the chantery was. Thel. Dig. 37. lib. 3. cap. 5. f. 7. cites Pasch. 12 H. 4. 19.

6. A man was outlawed by name of *J. P. Dyer*, and came by *capias utlagatum*, and said that he was a brewer and not a dyer, and writ issued to inquire it, and by some he shall be drove to his charter of pardon, because he is the same person. Br. Utlagary, pl. 15. cites 5 H. 5. 7. 8.

7. It was held that in writ brought against one by name of *J. Page of Pole*, it was a good plea at the common law to say that he never was of Pole. Thel. Dig. 57. lib. 6. cap. 17. f. 2. cites Mich. 11 H. 6. 13. and 19 H. 6. 58. But says that in this case it was held Trin. 21 H. 6. 59. that the pleading is to say that his name is *John Page of Dale*, and not *John Page of Pole*. Where it was said also, that at the common law in writ against one by name of *J. D. Smith*, it is a good plea to say that he is Carpenter and not Smith.

8. Issue may be taken upon Estate, Degree, and Mystery. Thel. Dig. 57. lib. 6. cap. 15. f. 16. cites Mich. 11 H. 6. 13. and several other books.

9. Debt against *J. N. Husband-man*, it is a good plea that he is Gentleman and not Husband-man, but it seems there, that if a gentleman be also a husband-man or craftsman, he may be named by the one addition or the other, and the statute is there well served, which says that he shall be named of the degree, state, or mystery of which he is, therefore he may be named the one or the other, and well; but per Strange, he shall be named by the most high name, which is Gent. but Brooke makes a quære thereof; for it seems the one or the other will serve the statute. Br. Additions, pl. 44. cites 14 H. 6. 15.

2 Inst. 668, 669. S. P. according to the opinion of Strange. — Thel. Dig. pl. 56. lib. 6. cap. 15. f. 5. cites 14 H. 6. 15. — But Br. Additions, pl.

50. cites 5 E. 4. 32. contra that he shall be named Gentleman, and not Husband-man. Per the justices.

10. In detinue of charters against *John Selby, Fishmonger*, he said that he was Gentleman and not Fishmonger; and held a good plea. Per Paston. Thel. Dig. 57. lib. 6. cap. 17. f. 7. cites Hill. 19 H. 6. 51.

11. In writ brought against one by addition of *Husbandman*, he said that he was servant to master Fortescue in the office of clerk, *absque hoc* that he was of the mystery of husbandry. Thel. Dig. 57. lib. 6. cap. 15. f. 7. cites Pasch. 20 H. 6. 33. where it was said that such clerk should be named Gentleman. Quære.

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12. Prisot said, that he never saw a writ abated for want of these words, Younger, or Son, but by surmise of the plaintiff, or of another of the same name [and] for his indemnity addition has been put, and not otherwise, but no writ shall abate for this default. Br. Additions, pl. 47. cites 39 H. 6. 46.

13. A. B. of C. is impleaded by name of A. B. of C. in the county of S. Brewer, and is outlawed and taken by *capias utlagatum*, and said that the day of the writ purchased he was Yeoman, and not Brewer, and exception was taken, because he pleaded it thus, viz, and the aforesaid A. B. &c. where, per Littleton, by this

\* It seems that these words (the aforesaid) should be omitted in this



this place,  
and so the  
objection is  
in the year  
book.

† 1 E. 4. 2.  
b. 3.

Br. Exi-  
gent. pl. 49.  
cites S. C.  
& S. P. ac-  
cordingly,  
because he  
took the  
mainper-  
norship up-  
on himself.  
—Br. Non-

ability, pl. 50. cites S. C. & S. P. accordingly; for Gentleman may be outlawed by the name of Yeoman.—But Br. Nonability, pl. 50. cites 7 E. 4. 1. that in replevin after issue, the defendant pleaded outlawry in the plaintiff after the last continuance by name of J. S. of D. Yeoman, and the other said that he was Gentleman, and not Yeoman, and the issue received; for now it seems that he is not the same person. Br. Nonability, pl. 50. cites 7 E. 4. 1.

this word *aforsaid* he *affirms all the name*, and therefore cannot say that he is yeoman, and therefore he *ought to have pleaded thus*, viz. *and \* the aforsaid A. B. who is taken, &c. says ut supra, &c.* and not [have said] the aforsaid; but the plea good, notwithstanding this word aforsaid; for by it he *affirms part of the name, and not all*. Quære of proper name if he pleads misnomer of it by this form, viz. aforsaid A. B. Br. Misnomer, pl. 52. cites † 1 E. 4. 2.

14. Bill, the defendant said, that the plaintiff by name of J. S. of L. Gent. was mainpernor for W. N. and after was outlawed for the not coming of the said W. N. upon *capias pro fine*; judgment if he shall be answered; the plaintiff said, that the mainpernor was J. S. of L. Gentleman, but this plaintiff at the time of the mainprise, and always after, was Yeoman, and not Gentleman, and no plea; per cur. For he shall say *absque hoc* that he is the same person. Br. Traverse per, &c. pl. 236. cites 10 E. 4. 16.

15. In rescous, the attorney said that his master was a Sheriff, which is a name of dignity, not named sheriff; judgment of the writ, and a good plea; for it is not contrary to his warrant of attorney. Br. Brief, pl. 321. cites 6 H. 7. 14.

Bendl. 153.  
pl. 212. S. C.  
& S. P.

16. In debt against B. in the county of S. the defendant was outlawed, and no addition was put to B. in the writ, but upon pleading this matter the outlawry was reversed upon the statute of 1 H. 5. And. 36. pl. 92. Mich. 8 & 9 Eliz. Collins v. Blagrove.

Yelv. 120.  
Hill. 5 Jac.  
B. R. the  
S. C. and  
Brownl.  
seems only  
a translation of Yelv.

17. Judgment was reversed for error in changing the defendant's addition to Esq; whereas throughout all the mesne process it was Alderman. Brownl. 99. Hill. 1 Jac. C. B. Markham v. Mollineux.

S. C. cited  
Arg. 3 Mod.  
139.

18. It was assigned for error to reverse an outlawry, that he was indicted by the name of J. S. of the parish of Aldgate, but does not shew in what county Aldgate is; and for this reason it was reversed, though Middlesex was in the margin; for an indictment shall not be taken by intendment, and the county in the margin shall be referred to the place where the offence was committed, and not to the habitation of the party. Cro. J. 167. pl. 7. Trin. 5 Jac. B. R. Leech's case.

2 Keb. 824.  
pl. 43. S. C.  
adjudged

19. In debt against Sir W. H. by the stile of Knight and Baronet, he pleaded in abatement that he was never knighted. It was moved to amend; for that he had put in bail by the name of Knight and Baronet, and so could not allege this matter, which the court agreed if it were so; but it was found entered for W. H. Baronet only; so they said they could not permit any amendment. But the plaintiff must of necessity arrest him over again. Vent. 154. Mich. 23 Car. 2. B. R. Sir William Hick's case.

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for the de-  
fendant.



20. Case by bill for goods sold, against Francis Gell, Esq; who pleaded that he was not F. Gell, Esq; but Merchant, whereon the plaintiff demurred, and judgment to answer over, because the statute of additions extends only to process where outlawry lies, and no outlawry lies on a bill. 12 Mod. 211. Mich. 10 W. 3. Martin v. Gell.

Action was brought by bill against T. P. Esq; he pleaded that he was a Gentleman, and not

Esquire. The plaintiff replied that the defendant *habitus & reputatus fuit*, as well an Esquire as a Gentleman; and sets forth that he was Esquire, tam ratione dignitatis suæ & parentelæ, sed præsertim dignissimæ occupationis, &c. Upon demurrer it was argued, that the plaintiff should have replied positively that the defendant was an Esquire, and not a Gentleman, and that the alleging it with a *habitus & reputatus fuit* was not good, because the addition ought to be the true one, and not maintained with a *habitus & reputatus*, &c. only; and Powell J. seemed to be of that opinion; but the suit being by \* bill, a respondeas ouster was awarded. 2 Ld. Raym. Rep. 849. Mich. 1 Annæ, Bennet v. Powel.

\* See (B) pl. 13. S. C.

21. Wrong addition, or omission of Knight, is void in pleadings and grants, though not in a conveyance. 5 Mod. 302. Mich. 8 W. 3. per cur. in case of the King v. the Bishop of Chester and Pierce.

22. An indictment of treason is not to be quashed by the statute for want of addition, unless the person indicted takes advantage of it. Per Holt Ch. J. 12 Mod. 198. Trin. 10 W. 3. the King v. Sir Henry Bond.

23. In debt upon a bond, the plaintiff declares by the name of Edward Nash Generosi. The defendant pleads in abatement, that the plaintiff is no gentleman, to which the plaintiff demurred, which was ill; for it amounts to a confession that he is no gentleman, and then not the same person named in the count; but he should have replied, that he is a gentleman. Judgment was given that the writ should abate. 2 Ld. Raym. 986. Trin. 2 Ann. Nash v. Battersby.

6 Mod. 80. Mich. 2 Ann. B. R. Battersby v. Marsh, S. C. & S. P. where the plaintiff in his bill declared and called himself

himself Gentleman, and held accordingly, but it being after general imparlance, they answer over.

25. In action against A. B. late of H. &c. Yeoman, the defendant pleaded in abatement, that he was a Horner. It was insisted that this was good; for if the defendant be not a gentleman he must be a yeoman, and that a horner may be a yeoman, viz. an ordinary or common person, and so the plaintiff may name him either by his degree or trade; the plea was adjudged ill, and the defendant ruled to answer over. 8 Mod. 52. Trin. 7 Geo. Mason v. Bushell.

S. C. cited by the name of Mason v. Russel as Pasch. 8 Geo. B. R. 2 Ld. Raym. Rep. 1541. — And ibid. says the S. P. was

adjudged Trin. 9 Geo. 1. B. R. Horspoole v. Harrison.

26. The defendant was sued by original, by the name of Gentleman, and pleaded that he was and is a Merchant, &c. and traversed his being or having been a gentleman; but was ordered to answer over, because by the statute H. 5. plaintiff may sue the defendant either according to his addition of degree, or mystery, and this writ being brought by the addition of his degree, he ought to have shewn what degree he was of, to shew the plaintiff might have a better writ. 2 Ld. Raym. Rep. 1541. Mich. 2 Geo. 2, B. R. Smith v. Mason.

27. In

27. In qua. imp. against J. H. and J. B. the defendant pleaded in abatement that there are 2 persons in the same county named J. B. sen. clerk, and J. B. jun. clerk, and that there is no distinction made; but the court held the plea repugnant. Comyns's Rep. 260, 261. Pasch. 3 Geo. 1. C. B. Husley v. Husley.

### (O) Abated by the Surplusage of Addition.

Br. Nuga-  
tion, pl. 11.  
cites S. C.

1. **D E B T** by J. N. administrator of the goods and chattels of N. P. and counted that the administration was committed to him by the ordinary, and counted of a duty due to himself by which the defendant said that W. P. made executor, who proved the testament after the administration committed, and so the name of administrator determined judgment of the writ. And the best opinion was that it is only surplusage, which is no matter of the part of the plaintiff; for it is only addition, As if J. N. of D. brings action and names himself Carpenter, where he is not carpenter; contra of addition of the part of the defendant. Br. Dette, pl. 78. cites 9 H. 5.

2. Præcipe J. N. Knight, and Lady A. &c. Rolf demanded judgment of the writ; for A. need not be named Lady. But per Babbington, it is not material if it be in the writ or out, for it is only surplusage, wherefore answer, Nota. Br. Brief, pl. 168. cites 8 H. 6. 9, 10.

3. In writ against such a one, Knight, Domino de A. &c. The writ is good enough; for Domino is only surplusage. Thel. Dig. 96. lib. 10. cap. 7. f. 15. cites Mich. 8 H. 6. 10. Or Dominæ. Ibid.

4. Notwithstanding that a man gives addition of place and mystery to the tenant in plea of land, the writ shall not abate; for it is only surplusage, and so it is of alias dictus. Thel. Dig. 97. lib. 10. cap. 7. f. 16. cites Mich. 35 H. 6. 12. Brief 121. and 30 H. 6. 5. Brief 111.

5. And so is that which comes after the nuper in the name of the defendant, if it be not a thing material. Thel. Dig. 97. lib. 10. cap. 7. f. 16. cites Hill. 38 H. 6. 28.

6. Writ of annuity was maintained upon title of prescription against an abbot by name of Jo. Abbot of C. alias dictus Lord Abbot of C. notwithstanding that Lord may be omitted in the writ. Thel. Dig. 51. lib. 6. cap. 3. f. 11. cites Mich. 35 H. 6. 12.

### (P) Want of Addition, cured by what.

1. **TRESPASS** against J. S. who said that in the same vill is J. S. elder and J. S. younger, and this defendant is J. S. younger, not so named, and demanded judgment of the writ, and because the defendant appeared and had given diversity of names, it was

was entered in the roll, and the writ awarded good. Br. Additions, pl. 16. cites 44 E. 3. 34.

2. In *trespass* against 2 who said that in the same county there were other 2 of the same name and surname, who are elder, and the defendants younger, yet the writ did not abate, and the plaintiff was received to put a diversity of names by addition of *Younger*; entered into the roll. Thel. Dig. 55. lib. 6. cap. 13. f. 8. cites Hill. 44 E. 3. 34.

3. It was held in *trespass*, that if one of the same name and surname with the defendant, comes in at the exigent, and the plaintiff says that he is not the same person whom he sues, that the plaintiff may put addition and have *exigent de novo*. Thel. Dig. 55. lib. 6. cap. 13. f. 7. cites Hill. 14 H. 4. 27. But says, Quære what shall be done after outlawry in this case, and cites 21 E. 3. 41. 5 E. 4. 25. 12 H. 6. 8. and 39 E. 3. 6.

4. In debt, at the *capias* the defendant named *J. S. of B.* appeared and demanded judgment of the writ, for he said that there is *B. upon M.* and *B. upon P.* *absque hoc* that there is any *B.* without addition. Port. said to this he shall not be received, for he has purchased *superfedeas* by the same name; and because this allegation stands with and was not contra, therefore no estoppel; the same law of attorney who has warrant, he shall not plead that No such vill as *B.* nor here, for this is contra, &c. Contra of that which may stand with, &c. Br. Additions, pl. 30. cites 19 H. 6. 35, 36.

[ 108 ]

The defendant in an appeal of murder purchased a *superfedeas* by the same name she was called by in the appeal, and afterwards pleaded

that she was named by a wrong addition, for that she was named Spinster, whereas she was Gentlewoman. The plaintiff replied and demanded judgment if she should be admitted to such plea contrary to the *superfedeas*, &c. The defendant demurred, but at length waived the demurrer propter opinionem curie, and pleaded Not Guilty, &c. D. 88. a. b. pl. 107, 108. Trin. 7 E. 6. Allington v. Oldcastle.

5. If a man appears and pleads and is condemned, he cannot assign it for error afterwards; as it seems; for as to matter of fact he ought to plead it if he appears; but contra where he is outlawed or loses by default. Br. Error, pl. 96. cites 7 H. 6. 39. and says note the diversity ut videtur; but as to this point 35 H. 6. and 5 E. 4. varies.

If the defendant has not such addition as the statute requires, yet if he appears upon process

and pleads, without taking advantage thereof by exception, he has lost the benefit of this statute. 2 Inst. 670.

If an *appeller*, who is named with an insufficient addition, or without any, appears and pleads to the appeal, he cannot afterwards take advantage of the defect of the addition, because by his appearance and plea he admits himself to be the person intended. And some have holden that the party by his bare appearance saves the want of an addition, or a bad one; but this seems contrary to almost all the authorities cited in relation to this matter, which seem to admit that the party before other matter pleaded may take advantage either of the want of an addition or of a bad one. 2 Hawk. Pl. C. 190. cap. 23. f. 123.

6. When a party indicted appears and does not take exceptions, but pleads to issue, and it is found against him, he admits it, and has passed by the advantage, and cannot now take exceptions for want of addition; per cur. Cro. J. 610. pl. 5. Hill. 18 Jac. B. R. in Johnson's case.

2 Roll Rep. 225. S. C. and S. P. by Doderidge J. for by the appearing and

pleading, it appears that he is the same party.—Sid. 247. Pasch. 17 Car. 2. B. R. in pl. 11 says it was affirmed by Keeling J. that the law is and has been adjudged to be, that ill addition or no addition is cured by the appearance of the party.—[But, as I have been informed, this was denied Hill. 11 Geo. 2. in B. R. in the case of the King v. Haddock.]

7. Want of addition is cured by the appearance of the parties, and so is *a bad one* in the case of an *indictment for keeping an unlawful game of nine-pins*, and so being of a small offence it was quashed; but had the offence been *riot, oppression, &c.* this is no cause to quash it. 1 Keb. 885. pl. 46. Pasch. 17 Car. 2. B. R. the King v. Warren.

[ 109 ] 8. The defendant being served with process by the name of Dubois, the *plaintiff entered an appearance* for him, and *obtained judgment by default*. It was moved to set aside the judgment upon an affidavit that his name was Davois, but the court refused it, and said that such kind of motions would destroy all pleas in abatement, since the late *act enabling the plaintiff to appear for the defendant*, and that his appearance by the name of Dubois is the same as if it was entered by the defendant himself. 3 New Abr. 634. cites Pasch. 7 Geo. 2. B. R. Halcock v. Dubois.

For more of Additions in general, See Abatement, Amendment, Grants, Discontinuance, Rescission, Attorneys, and other proper Titles.

## Adjournment.

Fol. 130.

### (A) Adjournment of the Term.

Cro. J. 445, 446. pl. 24. Anon. S. C. But no resolution as to the discontinuance.

\* The reports of those years are not printed.

Cro. J. 230. 231. pl. 9. S. C. Mich. 7 Jac. B. R. this was ended by composition. But at the end

[ 1. ] IF the term of St. Michael be adjourned in *octabis Mich. till mense Mich.* (as it was in 3 Jac.) there can be no continuance from *octabis Mich. to octabis Hill.* without a continuance to *mense Mich.* but this will be a discontinuance, for in as much as the term was adjourned in *octab. Mich. to mense*, no continuance can be to *octabis*, for all appearances and continuances were adjourned to *mense Mich.* and then in as much as no continuance was to *mense* this is discontinued. Mich. 15 Jac. B. R. between Osborn and Huntly, per curiam, a judgment reversed for this cause. My Reports, \* 10 Jac. 11 Jac. the same case.]

[ 2. Upon such an adjournment in *octabis, &c.* an infant that comes to be inspected upon a writ of error upon a fine, who will be of age before the time, to which it is adjourned, cannot be inspected, because all appearances also are adjourned. Sir Robert Poyne's case, this was a great question, but he was inspected by consent, and errors released.]

of the case it is said, viz. Note, afterwards Fleming said, that upon conference with the justices it was resolved that this inspection was good, notwithstanding the adjournment.—2 Brewal. 278.

179. S. C. but no resolution.—Jenk. 317. pl. 8. says he may be inspected at this day on which the adjournment is made; by all the justices of England; for if after the day of adjournment, and before the day to which it is made, he attains his full age, the inspection will fail; and quod necessarium est, licitum est.

[ 3. If the writ of adjournment of the term be *ab octabis Mich. to mense Mich.* the adjournment ought not to be made till the morrow after the 4th day. 21 Ed. 4. 37.]

Br. Exposition, pl. 47. cites S. C. accordingly.

ly.—Ibid. pl. 19. cites S. C. accordingly.—Br. Adjournment, pl. 28. cites S. C.

[ 4. If the adjournment be *de octabis Mich. to mense Mich.* there ought to be appearances at octabis, for this is not adjourned, but this is taken exclusive. Mich. 15 Jac. B. R. between Osburn and Huntley, agreed per curiam, and Houghton said he once knew it so. 21 E. 4. 37.]

And if they do not appear at the day they will be condemned.

Br. Adjournment, pl. 28. cites S. C.

[ 5. But otherwise it is where the adjournment is *in octabis to mense*. 21 Ed. 4. 37. D. 225. [Mich.] 5. 6. Eliz. f. 35. for there the essoigns cannot be kept at octabis; for the return of octabis cannot begin, and be held, and be adjourned the same day also.]

Br. Exposition, pl. 47. cites S. C.

accordingly.—Ibid. pl. 19. cites S. C. accordingly. But if the writ of adjournment had been (*in ab octabis, &c.*) then it might be done the first day.

[ 6. If the adjournment be of all writs, pleas, &c. from one common return to another common return, as *de octabis Mich. ad 15 Mich.* and such like, this will not adjourn pleas by bill in banco regis; for upon these pleas the continuances are to certain days, and not to common returns, and therefore upon such adjournment all the pleas upon bills are discontinued. \* 4 Ed. 4. 40.]

Br. Adjournment, pl. 27. cites S. C. & S. P. accordingly, As where a bill which was at issue in B. R.

had day to Monday the 2d of July, and not a common day, and therefore it was discontinued.

\* See infra pl. 11. S. C.

8. When adjournment of the term comes, the Chancery is not adjourned; for this court is always open. Br. Jurisdiction, pl. 74. cites 4 E. 4. 21.

Br. Brief, pl. 349. S. P. cites S. C.

9. Note, when a man is taken by capias returnable octab. Trin. and is bound to the sheriff in 40 l. to appear at the same day to save him harmless, and this term at the day, and all the returns in it, are adjourned to 15 Mich. there his appearance shall not be recorded octab. Trin. but at 15 Mich. and this shall save his bond and discharge him; for no appearance, essoign, nor default, nor other things shall be entered at the term adjourned, for no roll is made of it, but only of the writ of adjournment, and all things which should be done at these days adjourned, shall be done at the day to which the term is adjourned, and this shall serve for all. Br. Conditions, pl. 142. cites 4 E. 4. 21.

Fitzh. Detente, pl. 75. cites S. C. the justices bid him to keep his day at 15 Mich. and then he would save his surety well enough; for by this adjourn-

ment the day of octab. and the day of 15 Mich. are as one and the same day.

In debt upon obligation to a sheriff to appear at Westminster such a day to answer, &c. the defendant pleaded, that before the day of the return of the writ the term was adjourned to Hertford, and he appeared there. It was held, that the obligation shall always relate to the day and place comprized in the writ, for that shall not have regard to the adjournment, and he ought to appear in B. R. or shall forfeit his bond, as \* 9 E. 4. is, and that so are diverse precedents; and that though he does appear, yet if his appearance be not entered of record he forfeit his obligation, and he ought to conclude

proat

prout patet de recordo; and of that opinion was all the court. Cro. E. 466. pl. 16. Hil. 38 Eliz. B. R. Corbet v. Cook.—Mo. 430. pl. 601. Corbet v. Downing, S. C. the party had not forfeited his bond. But quere if he had appeared at Westminster and not at St. Albans? and Popbarn thought the word *Westminster* in the condition made the obligation void by the statute 23 H. 6. because there is not any such name in the writ for appearance.

\* This seems misprinted for 4 E. 4. 21.

10. By the writ of adjournment *nothing can be done at that day but to adjourn* the term to the day appointed, and no appearance can be made on any thing done but only to read the writ of adjournment, and to adjourn all appearances, and all matters and proceedings, and jurors, unto the day appointed by the writ of adjournment. Arg. Cro. J. 446. in pl. 24. cites 4 E. 4. 20 & 41. 21 E. 4. 37. and Mich. 7 Jac. Sir R. Points's case.

Br. Amend-  
ment, pl.  
70. cites 4  
E. 4. 41.  
S. C.—  
Br. Parlia-

[ 111 ]

ment, pl. 3.  
54. cites

S. C.—

The smaller  
editions of  
Brooke cite

this at tit. Discontinuance of Process, pl. 36. as 4 E. 3. 40. but are misprinted and should be 4 E.

4. 40.—Fitzh. Discontinuance, pl. 27. cites S. C. accordingly.

11. *Trinity term was adjourned, and the writ of adjournment made mention only of actions, suits, pleas, &c. octabis Trinitatis, 15 Trinitatis Johannis, and so of common day only that they should be adjourned to 15 Michaelis, and there was a bill between two parties who were at issue, and had special day, as Die Lunæ, &c. and this passed for the plaintiff, and he demanded judgment, and it was alleged in arrest of judgment that this was a discontinuance, & verum est, per cur. and it cannot be amended, and therefore it was shewn to the parliament, and by special act of parliament the writ of adjournment and the roll thereof was amended, and extended as well to special days as to common days; quod nota. Br. Discontinuance de Process, pl. 36. cites 4 E. 4. 40.*

Br. Ad-  
journment,  
pl. 28. cites  
S. C. that 3

12. *Three proclamations shall be made, when the writ of adjournment of the term shall be read. Br. Proclamation, pl. 6. cites 21 E. 4. 37.*

proclamations were made, and then the term was adjourned, and the filacers made out writs to the sheriff to return the writs at the days mentioned in the adjournment.

7. Memorandum that the feast of the *Nativity of St. John Baptist*, 1556, fell upon the *Wednesday* which ought to have been the last day of Trin. term that year, and therefore was adjourned in the vigil to the *Thursday* next, because the day of this feast is not dies juridicus, and therefore the justices shall sit *Thursday*, and shall not lose the day. Br. Adjournment, pl. 35.

13. A writ of adjournment from mense Mich. to crastino Animarum contained, that all pleas, writs, &c. to be held or pleadable at any return before the said return of crastino Animarum, (naming the returns specially) shall be adjourned to the said return of crast. Anim. and therefore the justices upon view thereof thought, that as to writs, and pleas, &c. pleadable or returnable the said Mich. term after the said return of crast. Anim. there ought to be new writs, authorizing them to adjourn all the writs and pleas returnable after the said return of crast. Anim. as well as those before, and new writs were issued accordingly. And. 278, 279. pl. 286. Mich. 34 & 35 Eliz.

Popb. 33.  
Trid. 35

14. If the adjournment of a term be to be made in octab. Trin. it shall



shall be made in every court of B. R. and C. B. and Exchequer, the *very first day of octabis.* D. 225. Marg. pl. 35. cites Trin. 35 Eliz. Eliz. accordingly. — But if  
 it be adjourned to octab. Trin. then the justices held, that it shall [not] be adjourned till the rising of the court upon the 4th day of the said octabis. D. 225. b. Marg. pl. 35. cites Trin. 35 Eliz. — Poph. 33. pl. 2. Trin. 35 Eliz. S. P. but says that the justices held, that the adjournment ought not to have been made until the sitting of the court the 4th day from octabis.

And because the writs were, That *as the said tres Trin. the term shall be holden thereafter, as if no adjournment had been,* the justices held that they ought to sit the first day of the said tres Trin. and so from hence every day until the end of the term, and for all causes, as if no adjournment had been; and so they did accordingly, saving, by assent, some of the justices did not come thither, by reason of their far distance from London at the end of the term upon the last adjournment; but they held, that if it had not been for the special words in the writ, which were, that it shall be then holden as if no adjournment had been, the essoigns had been the first day of tres Trin. and the full term had not been until the 4th day, which was the last day of the term; quod nota; and so it was of the adjournment which happened first at Westminster, and afterwards at Hertford from Michaelmas term now last past. Poph. 33. pl. 2.

15. Mich. term was adjourned from octab. Mich. till mense Mich. and at mense Mich. it was adjourned till craft. Anim. The justices held that the *quarto die post* is the day of sitting after adjournment, as it is where the term begins without adjournment. Cro. C. 13, 14. pl. 1. 3. Mich. 1 Car.

16. The 2 first returns were adjourned to tres Michaelis, which was Wednesday; the full term did not commence till the Saturday after, which was the quarto die post. D. 225. b. Marg. pl. 35. cites Mich. 6 Car.

17. Entry of an appearance, as of the first return, when the term was adjourned to another, is a discontinuance; per curiam. Keb. 273. pl. 61. Pasch. 14 Car. 2. B. R. Anon. [ 112 ]

18. An adjournment was from Westminster to Oxford, from the 1st day of the return to octab. Martini, and a proclamation appointing all persons to keep their days then and there. And a judge of every court came the 1st day to Westminster, and there held the essoigns, and read the writ of adjournment, and adjourned the courts to octab. Martini at Oxford, and at the essoign-day there they only held the essoigns, and did not sit in open court till the quarto die post. And by the proclamation all judicial hearings in Chancery, Exchequer, and Dutchy, and all decrees were stayed; and in B. R. in C. B. and Exchequer, no trial by jury, nor judgments upon special verdict or demurrer, were to be given. Lev. 176. Mich. 17 Car. 2.

19. A term was adjourned, except only the 2 last returns, to Windsor. Those two last returns cannot be held at Westminster by re-adjournment, because by the first adjournment the day in court is the quarto die post, and so only part of the return would be adjourned, which must not be; and it was held that it could not. And therefore upon the quarto die post craft' Pur' which was 6 Feb. the courts sate at Windsor, and heard some motions, and then read writs of adjournment of the last return to Westminster; and accordingly the courts sate at Westminster octab. Pur. For it was said that it is not requisite to wait till the quarto die post upon the 2d adjournment; and should it be so in this case, the term would be ended before that day. Sid. 276. pl. 2. Hill. 17 & 18 Car. 2.

(B) Adjournment. Trial of a *Foreign Plea*.

See (E) pl. 1. **I**N *real actions in London*, if a foreign plea be pleaded, it *shall be sent into the common pleas to be tried.* 3 Hen. 4. 12.]  
 1. 2. S. C. In a franchise such plea does  
 [ 2. But otherwise it is in *personal actions.* 3 H. 4. 12.]  
 not go to the jurisdiction in real actions; though otherwise it is of such plea in personal actions. Br. Jurisdiction, pl. 81. cites S. C. that it was so said there.—Br. Cause de Remover Plee, &c. pl. 41. cites 3 H. 4. 15. that such plea in debt in London goes to the jurisdiction; but upon *foreign voucher in plea real*, the plea shall be removed in banco by the statute to try the warranty, and afterwards be remanded. Contra in action personal; but at common law it was all one.—S. C. cited 2 Le. 37. in pl. 49.—S. C. cited Arg. Saund. 98.—[But for this see tit. Voucher, (B. b. 2) per totum.]—If foreign plea be pleaded in London, Lancaster, or the like, it shall be removed by certiorari out of Chancery, and sent into bank by mittimus to be tried, and this by the equity of the statute of Gloucester, cap. 13. Br. Cause de Remover Plee, &c. pl. 42. cites 22 H. 6. 58. 59.

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Fol. 131.

(C) At what *Time* it shall be made.

See (G) pl. 1. **I**N an *assise against divers*, if they severally take the intire tenancy upon them, and plead several bars and matter of difficulty, the assise shall not be adjourned till it is inquired which of them is tenant. 35 Aff. 2, 3. per curiam.]  
 21. S. P. and because they did not do so, but adjourned in bank, therefore it was remanded from the bank to inquire of the tenancy. Br. Affise, pl. 339. cites 35 Aff. 2.

(D) What shall be a good *Cause* of Adjournment of a *Foreign Plea*.

Br. Affise, pl. 32. cites 47 E. 3. 1. 2. **A**FTER verdict against the plaintiff in an assise, if the parties are adjourned to another day, at that day the plaintiff may be nonsuit. 47 Edw. 3. 2.]  
 —Br. Nonsuit, pl. 6. cites S. C.—Fitzh. Nonsuit, pl. 12. cites S. C.—But the law is otherwise now by the statute 2 H. 4. cap. 7. which see at tit. Nonsuit (D) pl. 14. and the notes there.

Br. Affise, pl. 260. (259) cites 26 Aff. 3. **I**N an *assise for rent-charge*, if issue be taken that he did not charge by the deed, which bears date in another county, the assise shall not be adjourned; for the deed is not denied. 47 Edw. 3. 2.]  
 —Fitzh. Visne, pl. 44. cites S. C.

S. P. Br. Affise, pl. 260. cites 26 Aff. 3. **B**ut otherwise it is if the assise be brought against an infant, and he says he did not charge by the deed; for there the deed is in question, as it seems. 26 Aff. \* 2. adjudged.]  
 Br. Visne, pl. 96. cites S. C. that the Visne was of the foreign county, as if he had pleaded Non est factum.—Br. Re-attachment, pl. 31. cites S. C.  
 \* It should be 26 Aff. pl. (3.)

S. P. Br. Affise, pl. **I**f in an assise the release of the plaintiff, bearing date in a foreign

foreign county, is pleaded in bar and denied, this is a good cause of adjournment in banco; for they cannot try it where the assise is brought. 22 Edw. 3. 12. b. 29 Ass. 70. 37 Ass. 16. adjudged 6 Ass. [4.]

cites 6 Ass. 4.—Br. Damages, pl. 155. cites S. C.

[5. In an assise [by 3 several summons's] if the tenant, as to 2 of the summons's, pleads 2 several issues triable where the assise is brought, and as to the third summons vouches in a foreign county, the whole assise shall be adjourned, because it shall not be taken by parcels. 17 Edw. 3. 28. b. [pl. 26.]

Fitzh. tit. Mortdancer, pl. 5. S. C.

[6. In a mortdancer, if the tenant vouches two, and prays that one may be summoned in the same county, and the other in a foreign county, because he had nothing in the same county, this is a good cause of adjournment, because otherwise both should not be summoned. 29 Ass. 48. adjudged.]

Br. Mort-

[114]

dancer, pl. 37. cites S. C.—See 2 Inst. 325. 326.

[7. If in an assise it be pleaded that part of the land is in a franchise, which ought not to be tried by foreigners, this is no cause of adjournment; for it may be tried by the assise. 30 Ass. 13. adjudged.]

The demandant replied that all lay in the guildable;

and by all the justices upon adjournment, this may well be tried by those of the guildable. Br. Trial, pl. 76. cites S. C. and says the reason seems to be, that though the place be a franchise, yet it lies in and is parcel of the same county, and the jurors can take conuſance throughout all their county.

[8. In an assise, if it be pleaded that the land is in another county, the assise shall not be adjourned upon this, but this shall be inquired by the assise. 29 Ass. 51.]

Br. Assise, pl. 301. (300) cites S. C. by Thorpe and Knivet.

[9. If in an assise the issue be, whether the land in demand was put in view in another assise, the record of which is pleaded in bar, and the sheriff returns the venire facias against the first jurors, that they have nothing to be summoned by, upon which one of the parties says they have assets in a foreign county, this is not any cause of adjournment of the assise to try it. 29 Ass. 70. adjudged; for the assise is to be taken in the proper county.]

Br. Assise, pl. 301. (300.)

[10. In an assise, if the deed bears date in the same county where the assise is brought, and the witnesses live in a foreign county, yet this is not any cause of adjournment; for the assise is to be taken in the proper county. 29 Ass. 70. \* 5 Ass. 7. adjudged † 6 Ass. 4.]

\* Br. Assise, pl. 118. [117] S. C. R lease of the plaintiff was pleaded

and denied, and because the witnesses were in another county, the assise was sent into bank by adjournment; and after, at the grand distress returned against the witnesses, they came not; whereupon the assise was in point to be remanded. And † Herle was in doubt by whom he should send the release, and to have a sure messenger. Br. Assise, pl. 118. [117] cites 5 Ass. 11. 7.

‡ The book of 5 Ass. pl. 7. is, viz. Herle then said, that he knew not why they should remand it, inasmuch as it was pleaded against him, and the tenant has shewed it before, and he would not find a messenger.—Br. Testmoignes, pl. 24. cites S. C. that the assise shall be remanded.

† Br. Assise, pl. 119. [118] cites S. C.

[11. In an assise by A. S. who was the wife of J. S. if the tenant says that J. S. is living in another county, this is no good cause of adjournment; for this shall be tried by witnesses. 36 Ass. 5. curia.

Br. Trial, pl. 79. cites S. C. and both the

**But** in this case, if the writ should be brought by the name of *A* without supposing the coverture before, \* it would be otherways. 36  
 \* Fol. 132. Aff. 5. It seems to be intended that he alleged coverture in another  
 same points. county.]  
 — See  
 tit. Trial, (E. 2.) per totum.

Br. Trial, [ 12. In an assise, if the *deed* of the ancestor with warranty be  
 pl. 79. cites pleaded [pleaded] in bar, and the demandant says that the ancestor  
 S. C. is living beyond the seas, or in another county, this shall be tried by  
 the assise, and shall not be adjourned. 36 Aff. 5. (It seems the life  
 cannot be tried by assise.) ]

13. Assise in the county of C. a foreign release was pleaded in the  
 county of N. and they were adjourned into bank for difficulty, and  
 after the deed was denied, and venire facias awarded to the sheriff  
 of N. and had day over, at which day the tenant made default, upon  
 which the assise was remanded. Br. Assise, pl. 97. cites 39 E. 3.  
 10.

[ 115 ] (E) *What* shall be said to be a Foreign Plea, for  
 which it shall be sent in Banco. Trial of a Fo-  
 reign Plea.

See tit.  
 Foreign  
 Plea.

See (B) pl. [ 1. ] **I**n a formedon in London, if a release with warranty be pleaded,  
 1. S. C. and dated in a foreign county, if the deed be denied, it shall be  
 the notes sent in banco. 3 H. 4. 12.]  
 there.

See (B) pl. [ 2. So if a warranty and assets be pleaded in a foreign county,  
 1. — 3 H. and the assets denied, it shall be sent in banco. 3 H. 4. 12.]  
 4. 15. 2.

pl. 4. It was said by Horton, Arg. That if in a formedon the tenant pleads the warranty with  
 descent in the county of Chester, the court will send to the justices there to inquire ; and so if he  
 pleads a release which bears date there.

Fitzh. Af- [ 3. In an assise, if a release be pleaded in a foreign county, the  
 fise, pl. 125. assise shall be adjourned in banco, to try the release. 13 H. 4. 3. b.  
 cites S. C. 22 Edw. 3. 4. b.]

Fitzh. tit. [ 4. In dower, if the tenant vouches another to warranty, and prays  
 Voucher, that he be summoned in the county of York, and Durham, which is a  
 pl. 29. cites county palatine, yet because the summons in York is sufficient, the  
 13 H. 4. voucher shall stand. 10 Hen. 6. 20.]  
 S. P. ac-  
 cordingly ;

and cites 18 E. 3. a like case. — Ibid. pl. 49. cites Pasch. 36 H. 6. S. P. where the prayer was to  
 summon him in the county of Wilts, Somerset, and Chester. Prisot said, that if the sheriff returns  
 that he has assets in either county, it is sufficient, and the whole is served. — 4 Inst. 219. S. P.

Br. Cinke [ 5. If a man be vouched in banco, and it is prayed that the  
 Ports, pl. 8. vouchee be summoned, in a county palatine, the common pleas shall  
 cites S. C. immediately award process to them there. 19 Hen. 6. 12. 52.]  
 — S. P.

and the

like of all things which arise in the county palatine. Br. Trials, pl. 39. cites 9 H. 6. 12. S. C.

If the tenant vouches two, one within the county palatine of Durham, and the other at the common law,  
 summons shall be awarded to the lord of the county palatine, commanding him to summon the  
 vouchee to be at a certain day before the justices here to try the warranty ; in this case, if the re-  
 nant recovers in value, the justices shall write to the lord of the county palatine to render in value.  
 4 Inst. 219. cap. 38. cites 19 H. 6. 52. — S. C. cited Fitzh. tit. Trial, pl. 7. by Paston, as a  
 precedent of a case so held.

[ 6. If

[ 6. If a *cause* be removed out of a county palatine into the common pleas, and the plea is put without day by protection, and after a *resummons* is sued, the *resummons* shall be directed to the sheriff of the county within which the county palatine is, or [and not] to the Bishop of Durham; for he shall not have jurisdiction again, being once disabled. 17 Edw. 3. 36.]

[ 7. If there be a *recovery in value in banco* against a *vouchee* that is within the county palatine, the common pleas shall award process there to execute it. 19 Hen. 6. 52. b.]

See pl. 5. S. C. and the notes there.

[ 8. In an *assise*, if the tenant *vouches* J. S. in the same county, and the sheriff returns that he hath not assets in this county, and it is averred that he hath assets in another county, the assise shall be adjourned in banco, to have him summoned in the county alleged. 36 Aff. 6.]

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(F) By whom a Foreign Plea may be tried.

See tit. Cinque Ports. — Courts, (R. a) (S. 4) — Tit.

[ 1. ] If there be an issue, whether a man was at large at B. at Chester at the time of the outlawry pronounced, it shall not be sent to Chester to be tried, because the king's writ does not run there. 3 Hen. 4. 15.]

Trial, (N. b. 6) — Tit. Wales (B)

[ 2. In an *assise* at York, if a *release* be pleaded, dated at Lancaster, yet shall the deed be tried by the justices and those of York. 3 H. 4. 15.]

Fitzh. Assise, pl. 125. cites S. C. — This

was only a case cited by Gascoigne, 3 H. 4. 15. in pl. 4. 2. and says the justices tried the deed by those of York, &c.

[ 3. In debt upon a lease for years in B. if the defendant pleads a release dated in Durham, this shall be tried in banco. 11 Hen. 4. 40. Quære.]

4 Inst. 205, cap. 36. Ld. Coke cites many books as to this

point in Marg. and says that in such variety of opinions he holds the law to be that the statute 9 E. 3. extends not to cases when any other issue is joined triable in the county palatine, but only of a deed pleaded in bar in any court at Westminster; and that he grounds his opinion on the resolution of all the judges of England in the Exchequer-chamber in 32 H. 6. 25.

[ 4. If an issue be joined in banco which is to be tried in Durham or Lancaster, as whether land be parcel of a portion, &c. there, the record shall be sent there to be tried, and when it is tried it shall be remanded in banco. \* 11 Hen. 4. 40. b. † 19 H. 6. 12. It shall be tried there and not in the county next adjoining; for these places were derived out of the crown.]

\* Br. Jurisdiction, pl. 25. cites S. C. — Br. Process, pl. 134. cites S. C. but S. P. does not

fully appear, — Br. Trial, pl. 27. cites S. C. by Hank and Culpepper. — Fitzh. Debt, pl. 112. cites S. C. — S. C. cited Br. Cinque Ports, pl. 8. at the end of the case.

† Br. Cinke Ports, pl. 8. cites S. C. — Br. Trial, pl. 30. cites S. C.

[ 5. If an issue be joined in Durham which cannot be tried there, this shall be sent in B. and they shall try it. 11 Hen. 4. 40. b.]

See pl. 4. S. C. and the notes there.

[ 6. If issue be joined in B. of a thing triable in London, this shall not be tried in banco, because the Londoners have a privilege not to come out of London. Quære 19 H. 6. 52. b.]

Fol. 133.

[ 7. But the court may try it there by *Nisi prius*. 19 H. 6. 52. b.]

[ 8. If there be a foreign voucher upon a *plea in ancient demesne*, this shall be tried in B. and after trial *remanded*. 19 H. 6. 53.]

See tit.  
Trial (I. a)  
pl. 8. and  
the notes  
there.

[ 9. If an issue be *joined in banco* of a matter triable in Ireland, this shall be sent into Ireland to be tried, and after trial shall be *remanded*. 19 H. 6. 53. b.]

Br. Trials,  
pl. 39. cites  
S. C.—  
Vaugh. 407.  
S. C. cited  
by Vaughan

[ 10. By the common law, all *things alleged in Wales* shall be tried by the sheriff of the *next county of England*, for else there would be a failure of right; for the court here cannot try this in Wales. 19 H. 6. 12. b.]

Ch. J. in the case of process into Wales.—Ibid. 404. Vaughan Ch. J. says that such trial was first ordained in parliament, though the act be not now extant; nor that it is conceivable how it should be otherwise, it being an empty opinion that it was by the common law, as is touched in several books, that knew the practice but were strangers to the reasons of it. For had the law been that an issue arising out of the jurisdiction of the courts of England should be tried in the next county to the place where the issue did arise, not only any issue arising in any the dominions of England out of the realm might by that rule be tried in England, but any issue

[ 117 ] arising in any foreign parts, as France, Holland; Scotland, or elsewhere, that were not of the dominions of England, might, *pari ratione*, be tried in the county next adjoining, whereof there is no vestigium for the one or the other, nor does it sort any way with the rule of the law.—Besides Wales was made of the dominion of England within time of memory, viz. 12 E. 1. and whatever trial was at common law must be beyond all memory; so that no such trial for land in Wales particularly, could be by the common law. Ibid. 408.

[ 11. If an issue be joined in B. of a *thing in Wales*, which should be tried there, yet shall not the record be sent thither to be tried; but it shall be tried in the *next county of England* next adjoining thereto, because Wales was a realm of itself. 19 H. 6. 12.]

Br. Cinque  
Ports, pl. 8.  
cites S. C.  
per Ful-  
thorpe.

[ 12. So if a man vouches another, and prays that he may be *summoned in Wales*, the process shall not issue into Wales, but to the *sheriff of the next county* adjoining. 19 H. 6. 12.]

Br. Cinque  
Ports, &c.  
pl. 8. cites  
S. C. and  
S. P. by  
Fulthorpe.

[ 13. If a *manor in Wales* be in demand here the writ shall issue to the sheriff of the *county adjoining*, to summon him in the said manor. 19 H. 6. 12. b. It seems not to be intended that he shall enter into Wales and summon him there, but in his own county.)]

—S. C. cited by Vaughan Ch. J. and that it was of the manor of Abergaveney, which was a Lordship Marcher, and held of the King in capite. Vaugh. 407. in the case of Process into Wales.

Br. Trials,  
pl. 39. cites  
S. C.—  
Br. Cinque  
Ports, pl. 8.  
cites S. C.  
per Fortes-  
cue and  
Newton.

[ 14. In a writ of *dower* in any court real [royal] in *Wales*, if they are at *issue upon Ne unque accouple* in lawful matrimony, the court there hath not power to make out process to the bishop, but the king shall write to the steward there, to *send the record here in bancum*, and here process shall be awarded to the bishop. 19 H. 6. 12.]

—S. C. cited by Vaughan Ch. J. Vaugh. 410. in the case of Process into Wales; but says that this is against the resolution of all the judges in Cro. 2 Car. fol. 34. [But see this case which is intended to be pl. 7.]

Br. Trials,  
pl. 39. cites  
S. C.—

[ 15. If in the court of a lord in *Wales* a deed is pleaded bearing date in another *seignory royal*, in this case the one hath not power



to write to the other to try this deed, and therefore it shall be sent into the *Common Pleas* to be tried. 19 H. 6. 12.]

Br. Cinque Ports, pl. 8. cites S. C. per Newton.

16. In a *formedon* in *Durham*, the tenant pleaded the warranty of the ancestor of the demandant with assets in a foreign county, whereupon the court awarded that the tenant should go quit without day. And the demandant, upon this judgment, sued a writ of error before the bishop, and assigned for error, that the justices awarded that the tenant should go quit without day, where they ought to have continued the plea by adjournment until the record had been removed. And for this error the bishop reversed the judgment, and day given to the parties before his justices where the plea was pleaded; at which day the tenant was essoigned, and a day given over, and at that day a writ came to remove the record into C. B. and day given to the parties in C. B. And this proceeding of the bishop was according to the usage there; and after by the advice of the whole court, a venire facias issued out of C. B. to try the issue joined at *Durham*. 4 Inst. 218. cites Mich. 14 E. 3. tit. Error, 6.

17. If a foreigner is vouched in *Chester* this shall be sent and tried there, and after shall be remanded. But it is said elsewhere that it shall be brought to the bank by writ of the Chancery. See the Register thereof, &c. Br. Trials, pl. 130. cites 49 E. 3. 9.

In *formedon* brought in *Chester*, the tenant vouched a foreigner. 10.

warranty in S. and the justice sent the record to C. B. and when the voucher was determined the court of C. B. sent it back to the justice, without writing to the chamberlain; per Dyer, who said he had seen such record; And Harper agreed that this might well be in such case. Dal. 101. pl. 33. anno 15 Eliz. in case of Bidle v. Spencer.

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18. 34 & 35 H. 8. cap. 26. §. 88. In case any foreign plea or voucher be pleaded, or made before the justices of Wales between party and party, triable in any other shire within Wales, the justices shall send the King's writ, with a transcript of the record under seal, unto the justice of the county where the matter is triable, commanding the said justice to proceed to the trial thereof, which trial he shall remand with the whole record unto the justice before whom the plea or voucher was pleaded.

19. S. 89. In case the foreign plea or voucher be triable within England, the justice shall proceed to trial thereof within the shire of Wales where the matter was pleaded.

20. In debt on bond for non-performance of covenants in assuring land in the county of *Chester*, they were at issue upon the value, which was to be tried by the county palatine, because the land lay there, but before the court had wrote to the county palatine the plaintiff prayed to discontinue the suit, and it was granted; for it was said that the record cannot be demanded but at his suit only. And Dyer said that the record shall be sent to the justice of *Chester*, and that the court shall write to him as officer immediate, and he shall thereupon make a venire facias to the sheriff. But Harper said that the writ shall be to the Chamberlain, and that he shall make a venire facias to the sheriff. Dal. 101. pl. 33. anno 15 Eliz. Bidle v. Spencer.

See tit.  
Voucher  
(E. b. 2.)

## (G) After Adjournment, what Plea may be pleaded.

\* Br. Adjournment, pl. 1. cites 42 E. 3. 11. [1. **WHEN** a plea is pleaded to a certain point, and an adjournment thereupon, the party shall *not* plead a *new plea not pursuant to the first.* \* 42 E. 3. 12. 44 Aff. 28.]

S. C.——Affise was adjourned, whether the plaintiff should have affise of 10 l. rent, or only of 40 s. rent, and it was adjudged for the plaintiff upon the adjournment, and that the affise lies of the 10 l. rent, and the tenant upon this would have pleaded in bar, and was not suffered, because they were adjourned upon a point certain; quod nota. Br. Adjournment, pl. 11. cites 8 Aff. 10.

\* Br. Adjournment, pl. 2. cites b. 44 Aff. 28.] [2. The same law though it be pleaded by an infant. \* 44 E. 10.

S. C.——Br. Coverture and Infancy, pl. 8. cites S. C.——Br. Garranty, pl. 10. cites S. C. but not S. P.——Fitzh. Affise, pl. 56. cites S. C. and S. P.

\* Br. Adjournment, pl. 1. cites S. C.——† Br. Adjournment, pl. 31. cites S. C. [3. But after adjournment he may plead a new plea pursuant and proving the first. \* 42 E. 3. 12. † 44 E. 3. 31. 42 Aff. 20.]

Br. Adjournment, pl. 1. cites 42 E. 3. 11. S. C. [4. As if an affise was adjourned upon a special plea to prove the other a bastard, which is but evidence to convey him to the issue that he is a bastard, and therefore in banco he may say that he is a bastard. 42 E. 3. 12.]

which was affise by W. and E. his feme against H. who said, that where E. claimed as daughter and heir to R. T. that he is son to R. T. Judgment, &c. The plaintiff pleaded by way of Estoppel, that is another affise by her against this same H. he pleaded that R. T. was seised in fee, and took M. to wife, who had issue this same H. and after, during M's life, took another wife, and had issue E. the plaintiff, and thereupon E. rejoined that H. was a bastard, and so demanded judgment, in as much as H. confessed, that during M's life R. T. took another wife, and had issue E. the plaintiff in the espousals, whereby it shall be intended that a divorce was had between R. T. and M. his first wife, and that the espousals between R. T. and the second wife continued all their lives; judgment if he shall be received to claim as heir, and thereupon they were adjourned to Westminster: and at the day it seemed to the justices that the estoppel was not good; for E. the plaintiff confessed that H. was son of the first wife, and did not shew divorce between R. T. and the first wife, and by the pleading the second espousals a divorce shall not be intended unless alleged in fact, and therefore the court was of opinion against the plaintiff; whereupon E. said that it is a bastard, to which he answered, that she shall not plead this after adjournment; for, per Kirton, where they are adjourned upon a plea certain, they shall not afterwards plead a new plea; quod Finch concessit if it be not pursuant to the first matter; but here it is as evidence in affirmance of the bastardy, and thereupon day was given till the day after, at which day the plaintiff being demanded did not come, and judgment quod nil capiat per Breve.

[5. So if the plaintiff says the tenant was born before the marriage, upon which they are adjourned whether he shall have the plea without concluding fully that he is a bastard, he may in banco say, that the tenant pending this action was certified a bastard by the ordinary in an action between him and another, and upon which judgment is given. 18 E. 3. 33. b.]

Fol. 134. [6. In an affise against baron and feme, if the affise be adjourned into bank upon a special point, and at the day in bank the husband makes default, and the wife is there received, she may plead the same plea that was pleaded before. 3 H. 4. 18.]

Kelw. 109. b. in pl. 30.

Casus incerti temporis, Anon. S. P. Arg.——Br. Adjournment, pl. 32. cites S. C. and says, Note, that upon adjournment of a foreign release in affise in bank pleaded by baron and feme, [it was

was held] by some, if at the day in bank the baron made default, there the *sems* cannot be rescived; for their power is only to try the foreign dead, as in case of a foreign voucher in London, and yet the same was rescived.

[ 7. So he may plead that the release before pleaded was made in another place than was pleaded before. 3 H. 4. 18.]

[ 8. If an assise be adjourned in bancum upon a \* certain point, \* See pl. 27. scilicet, on a challenge to a plaint, if this be adjudged as challenge, yet he may take another challenge, and falsify the plaint by as many causes as he can. 17 E. 3. 34. b.]

[ 9. And the other may maintain the plaint by as many things as he can. 17 E. 3. 34. b.]

[ 10. In assise, if the tenant pleads bastardy in the plaintiff, to which the plaintiff says he was born during the espousals between his father and mother, upon which they are adjourned in bank, whether the plea be but evidence that he is a mulier, the tenant may say in bank, that there was a divorce, &c. between the father and mother, for this is pursuant to his first plea, scilicet, to prove him a bastard in the Court Christian. 39 E. 3. 31. b. \* 39 Aff. pl. 10.]

\* Br. Adjournment, pl. 23. cites S. C. & S. P. accordingly, but if the new matter had been contrariant to the first

plea, it would be otherwise.—Fitzh. Bastardy, pl. 18. cites S. C.

[ 11. In an assise for a rent, if the plaintiff makes title thereto, that A. was seised in fee, and granted this to B. in fee, who devised it in fee, and the parties demur, because the plaintiff hath not shewn forth the deed of grant made by A. to B. upon which they are adjourned before themselves at Westminster, the plaintiff may there shew forth the deed; for this is pursuant and enforcing the matter alleged before. 38 Aff. 28. adjudged.]

S. P. Br. Adjournment, pl. 21. cites S. C.—Br. Monstrans de Faits, pl. 101. cites

S. C. but not S. P.

[ 12. In an assise, if the tenant pleads that he is heir to J. S. who died seised, and the demandant pleads a matter to prove him a bastard, upon which they are adjourned in bank, whether the plea be but evidence, (salvis partibus rationabilibus) the demandant in bank may say that the tenant is a bastard; for this is an enforcement of his plea before. 42 Aff. 20. adjudged.]

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[ 13. So if in an \* assise the tenant pleads in person, or by attorney in abatement, a plea triable by the assise, upon which it is adjourned, he cannot plead in bar afterwards. 50 E. 3. 19. b. adjudged. But if the party pleads a matter of record, or other matter not triable by the assise, and upon this it is adjourned, he may plead in bar after. 50 E. 3. 20.]

\* S. P. Br. Assise, pl. 41. cites 50 E. 3. 9. but it should be [19.] But it was admitted that if he had pleaded a plea to the

[ 14. So if the tenant in an assise pleads by bailiff, after adjournment he may plead in bar. 50 E. 3. 20.]

bar by bailiff, and so at issue nul tort; or if the assise had been taken by default, there he may at another day come in person, or by attorney, and plead a plea in bar, upon which certification of assise lies; but not at the same day that the assise is awarded upon plea of the bailiff. But where a man demurs in law upon a plea to the writ, and it is adjourned upon matter in law, which is adjudged against the tenant, there he may plead in bar; but contra upon a plea to the writ, and issue taken upon it, and it is adjourned but to know how it shall be tried; for there the parties were at issue before.—Br. Trial, pl. 16. cites 50 E. 3. 19. S. C. but I do not observe the point of the bailiff there.

[ 15. If the adjournment be for difficulty upon the issue, by what county Affise in pais, if the

*parties are at issue which arises in a foreign country, the assise shall be adjourned into bank to try the issue, and if it be in fail, the parties shall replead there. Quod nota. Br. Adjournment, pl. 7. cites 22 H. 6. 19.—Fitzh. Repleader, pl. 16. cites S. C. and it was awarded that they should replead without remanding the assise, and that they need not replead all de novo, but should commence the plea where it was faulty, &c.*

*county the issue shall be tried, if it appears to the court that the issue is mistaken, yet the court hath not power to make them replead. 14 H. 4. 10.]*

[ 16. In an assise, if the tenant makes title as heir to J. S. and the plaintiff says the tenant was born before marriage, upon which the parties are adjourned, whether the plaintiff ought to conclude fully that he is a bastard, he may after plead a release in bar. 18 E. 3. 33. b.]

The defendant shall not plead a

[ 17. If an assise for difficulty be adjourned in bank, the defendant may plead the release of the plaintiff after.]

release at the day of adjournment upon another point, unless it was made after the last continuance. Br. Adjournment, pl. 18. cites 23 Ass. 5.—S. P. For he might have pleaded it at first. Br. Assise, pl. 251. cites S. C. per Shard.

[ 18. So if an assise be for difficulty adjourned from one session to another, the defendant may plead the release of the plaintiff after. 21 E. 3. 23. 21 Ass. pl. 9.]

Both the cases cited are the same, and in totidem verbis the

Fol. 135.

[ 19. In an assise, if it be pleaded that in an assise by the plaintiff he pleaded the release of the plaintiff, and the plaintiff did deny his deed, and it was found by verdict his deed, and after the plaintiff was nonsuit; if this plea be adjourned [to inquire] whether it be sufficient to bar the plaintiff in this assise to deny his deed, the defendant in B. may aver that this is the deed of the plaintiff, and waive the estoppel. \* 18 E. 3. 35. 17 Ass. 28. adjudged.]

one as the other.—Fitzh. Estoppel, pl. 223. cites S. C. and per tot. cur. the plaintiff may have the averment to deny the deed, notwithstanding the verdict, which was annulled by the nonsuit upon the adjournment for difficulty; and thereupon the defendant said he would maintain that it was the plaintiff's deed, and the court compelled the plaintiff to accept the averment, though after a demurrer.

It was objected that

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there was no true reason why a

[ 20. In an assise, if the tenant pleads in bar a recovery against the plaintiff, who makes title before the recovery, and the tenant pleads a matter to oust him from his general title, without shewing how, &c. upon which the parties demur, and this is adjourned in bank, the plaintiff may make title, and shew how, &c. in bank. 32 Ass. 9.]

man should not be compelled to shew how he came to a title in time before the bar, as in time after it. But Kniver said, that when one brings assise of novel disseisin, and the tenant pleads in bar, and the plaintiff makes a title to himself of time subsequent, there, because the law intends the assise to be brought by colour of this possession, he shall not be received without shewing how, because he cannot come to it afterwards, unless it was of the estate of him who recovered, by which recovery every possession between the disseisin and the recovery is defeated; but when one makes title of time precedent, it shall be intended a title of a possession had a long time before the seisin of the tenant. 32 Ass. 197. 2. pl. 9.

\* Fitzh. Assise, pl. 120. cites S. C.  
† Br. Adjournment, pl. 19. cites S. C.

[ 21. In an assise against two, if each takes upon himself the entire tenancy, and pleads several bars, upon which the plaintiff, without electing his tenant, demurs upon the pleas that they should not bar him; upon which the justices of assise adjourn them before themselves at Westminster, (not in bank) the plaintiff may there elect his

his tenant; for upon this adjournment they are as they were in the country. \* 22 E. 3. 5. b. † 23 Ass. 16. adjudged.] Br. Assise, pl. 255. (254) cites S. C. accordingly, per † Thorpe, because they were adjourned before the same justices in the same plight as they were in the country.

† This should be Shard.

[ 22. And the plaintiff may say after he hath elected one for his tenant, that the others are named as disseisors, and therefore he may pray to be discharged of their pleas in bar. 23 Ass. 16. adjudged.] Br. Assise, pl. 255. (254) cites S. C.

[ 23. In an assise, if the tenant pleads the release of the ancestor of the plaintiff with warranty, to which the plaintiff says that the ancestor was seised for life, the remainder to the plaintiff in tail, the remainder to the right heirs of the lessee, and after the lessee granted all his estate to the tenant, and after released to him in fee, with warranty; upon which the parties demur: whether the plaintiff shall be barred by this, and it is adjourned for difficulty to Westminster; the tenant cannot say there, that he to whom the release was made was seised in fee; for this is not an enforcement of his first plea. 44 Ass. 28. 44 E. 3. 10. b. adjudged.] Br. Adjournment, pl. 2. cites S. C. and that this was by the opinion of both benches; but because the tenant was an infant, the assise was re-

manded to be taken at large, to inquire of the seisin of him to whom the warranty was made, &c. —Br. Assise, pl. 21. cites S. C. accordingly, and that the tenant being an infant, nothing shall be held as not denied by him, and therefore the assise to inquire of it. And Brooke says, Et sic videtur that the assise shall be at large as well where the defendant is infant as where the plaintiff is —Br. Coverture & Infancy, pl. 8. cites S. C. accordingly. —Fitzh. Assise, pl. 56. cites S. C. accordingly. —Both the Year-Book and the Book of Assises report this case in almost the very same words.

[ 24. If in an assise it is pleaded, that baron and feme were seised by force of a second fine, and not by force of a fine before, shewing the matter specially, upon which the parties are adjourned to Westminster before themselves, he may there allege an office to prove him to be in by the second fine; for this is pursuing the first plea, and enforcing it. 44 Ass. 35. 44 E. 3. 31. adjudged.] S. P. Br. Adjournment, pl. 24. cites 44 Ass. 35. And it is no new matter nor contrariant; for

he shall not have new matter nor contrariant at the day of adjournment. —S. P. Ibid. pl. 31. cites 44 E. 3. 31.

[ 25. In an assise, if the tenant pleads in bar a fine and nonclaim, to which the plaintiff says he was within age at the time of the nonclaim; upon which the tenant pleads a second fine and nonclaim when he was of full age, upon which the parties are adjourned whether this be a departure, the tenant in bank may say that the plaintiff was of full age at the time of the first fine, notwithstanding the adjournment. 1 Ass. 6.] S. P. Br. Adjournment, pl. 8. cites 2 Ass. 6. The question [ 122 ]

was whether he should have the plea or not, and it was received; and the reason seems to be, because nothing was entered to maintain the second answer.

The case in Lib. Ass. 1. pl. 6. is a D. P. but the 2 Ass. pl. 6. is S. P. so that it seems to be misprinted. —Br. Departure, pl. 17. cites S. C. that the plea was not received, because it is a departure. —Br. Continual Claim, pl. 7. cites S. C. that the tenant cannot allege other fine and nonclaim at full age; but that now this nonclaim is ousted by the statute of 34 E. 3.

[ 26. In an assise against A. and B. if A. pleads in abatement that B. is his wife, and not named his wife, and B. pleads in bar, upon which plea it is adjourned in bank, A. the husband may there relinquish S. P. Br. Adjournment, pl. 17. cites



S. C.— *quish his plea in abatement, and plead in bar.* 23 Aff. 4. adjudged Br. Affise, per curiam.] pl. 250.

[249] cites S. C.—Br. Waiver de Choses, pl. 29. cites S. C.—S. C. cited in the argument of the judges. And. 231. Trin. 32 Eliz. in pl. 246.

Br. Peremptory, pl. 28. cites S. C. Brooke says, to see that it is not peremptory.—S. P. [ 27. In an *assise of his freehold in E.* if the tenant *pleads the fine of the ancestor of the plaintiff, proving the lands to be in C.* in abatement of the writ, upon which plea the parties are adjourned into bank, and adjudged no plea in abatement, the tenant may after there *plead in bar*, though the adjournment was upon a \* *certain point.* 6 Aff. 1. adjudged.]

Br. Adjournment, pl. 9. cites S. C. and M. 7 E. 3. accordingly.

\* See pl. 8.

Fitzh. [ 28. If upon a foreign plea the parties are adjourned into bank, if the *tenant in bank pleads a plea in abatement* of the writ *puis dar-\** *rain continuance, the court* there hath not power to abate the writ, nor to put the parties in issue thereupon, because they *have only power to try the issue, &c.* upon which the record was sent there, *\*Fo. 136.* 49 E. 21. b.]

Barre, pl. 225. cites S. C.— Upon a verdict in assise of novel disseisin the parties were adjourned to Westminster in the Exchequer chamber before themselves for difficulty, and there, at the day, adjourned the parties into C. B. and sent all the record of assise thither, and the last term one of the defendants pleaded the death of the other (who was found jointenant with him) puis darrein continuance, &c. See D. 132. pl. 78. Mich. 2 & 3 P. & M. Grenfield v. Stretch.—Bendl. 42. pl. 74. S. C. the opinion of the court was, that he shall not have the plea, but this matter will aid him in writ of error if judgment be given, because now by his death the writ is abated.—3 Le. 5. pl. 12. S. C. and says it was not allowed, because the parties had no day in court to plead it; but after judgment error lies.

Fitzh. [ 29. But upon such new plea pleaded, the *court* either *ought to continue the first issue* there, or otherwise, if they remand the record, to *shew the cause*, so that the *darrain continuance* may appear there. 49 E. 3. 21. b.]

Barre, pl. 225. cites S. C. 30. In assise an infant *alleged outlawry of felony in bar*, and at another day he was suffered to plead the *release of the plaintiff*; quod nota. Br. Adjournment, pl. 13. cites 14 Aff. 15.

[ 123 ] (H) When the Plea is tried what shall be done.  
[Remanded or not.]

S. P. They cannot do right for want of power, and therefore re-summmons lies. [ 1. ] IF the *conusance of a plea* be granted out of the common pleas to a franchise, and there is a *foreign voucher*, upon which a *resummons* is sued in bank; when the voucher is there tried, this *shall not be remanded to the franchise*, because they have failed of right; for here the conusance was first granted upon condition quod celeris fiat partibus justitia, alioquin redeant. 11 H. 4. 28. 87.]

Br. Re-summmons, pl. 9. cites 11 H. 4. 27.—Br. Conusans, pl. 16. cites S. C.—Br. Voucher, pl. 161. cites S. C. & S. P. by Hanke and Hill; but if the record had commenced in the franchise, (viz. Salop) or in London, and the tenant vouchers a foreigner, it might be removed and tried in bank, and remanded; but otherwise in the principal case; but Thirne did not agree to this opinion.

[ 2. But



[2. But if a trial is in bank upon a foreign voucher in London, by the statute of Gloucester the record shall be remanded. 11 H. 4. 28.]

[3. If the tenant in an assise vouches a foreigner, upon which the plea is adjourned in bank, where the vouchee demands the lien, and the deed of his ancestor being shewn to bind him to warranty bears date where the land is, which is denied, yet this shall not be remanded till this issue is tried, because this is out of the points of the assise, to which issue the demandant is not party. 17 Ass. 9.]

4. An assise against 2 in [one] county, the one pleaded release made in another county, and witnesses in divers counties, which was denied, whereupon the assise was adjourned into bank, and tried there, and found Not his deed, and the plaintiff released his damages, and prayed judgment of the deed immediately, and had it, and the defendant imprisoned for pleading a false deed, and Mich. 5. and Pasch. 8. accordingly. Br. Assise, pl. 119. [118] cites 6 Ass. 4.

Br. Trial, pl. 71. cites S. C. but not exactly S. P.

Br. Damages, pl. 155. cites S. C. and Brooke says, that hereby it seems that the damages shall be tried by the

jury of the county where the land lies; for the foreign county cannot try the damages.—Br. Adjournment, pl. 12. cites S. C. & S. P. accordingly.—Br. Assise, pl. 133. cites 8 Ass. 15. S. P. accordingly. And Brooke says, Et sic vide, that where nothing rests but the foreign matter, there the justices of C. B. may give judgment immediately, but the damages shall be inquired by the assise, and that T. 7. and M. 15. is accordingly; Et sic vide, that upon release pleaded and found against the defendant, the seisin and disseisin shall not be inquired, but only the damages; for the release implies confession of the seisin and disseisin.—Br. Adjournment, pl. 12. cites S. C. & S. P. but if the plaintiff releases the damages, C. B. may give judgment immediately.—2 Le. 41. pl. 55. cites 6 Ass. 4. and 8 Ass. 15. accordingly, per cur. But said that this differs from the principal case of Lucas v. Picroft, wherein parcel of the lands does remain not tried, which the plaintiff cannot release as he may the damages.—3 Le. 137. pl. 186. S. C. of Lucas v. Picroft in much the same words, only 6 Ass. 4. is misprinted there, and made 6 E. 4.—See the case of Lucas v. Picroft in the notes to the plea next following.

5. Where the assise is adjourned for difficulty of verdict, they may give judgment here in C. B. 16 H. 7. 12. a. per Fineux.

Assise was brought of 2 acres in

the county of N. and as to one acre the defendant pleaded a plea triable in a foreign county, whereupon the issue was adjourned into C. B. and thence into the foreign county, where it was found for the plaintiff. Judgment was prayed for the plaintiff upon the 16 H. 7. 12. but the whole court e contra, because there is another acre which must be tried before the justices of assise, before which no judgment shall be given for the acre tried. And the assise is properly depending before the justices of assise, before whom the plaintiff may discontinue the assise, and the verdict was remanded to the justices of assise. 2 Le. 41. pl. 55. 30 Eliz. C. B. Lucas v. Picroft.—3 Le. 137. pl. 186. Pasch. 28 Eliz. C. B. S. C. in much the same words,

## (I) To what Place it may be adjourned.

[ 124 ]

[1. THE justices of assise have power to adjourn the parties to Westminster, or to other place in itinere suo. 47 E. 3. 2.]

The justices of assise, if they have writ of Si

non omnes to them, or one of them, and one who is associated to them hac vice, [if one of the justices does not come, the other justice and the associate] may adjourn the assise in the circuit for difficulty, and thence to Westminster if they will, and thence into C. B. and so they did, and thus by the express words of the statute, and by 21 Ass. 21. they may adjourn the assise before them in another county, &c. Br. Adjournment, pl. 4. cites 12 H. 4. 20.—S. P. and in all these one after another. Br. Assise, pl. 59. cites S. C.—The words (alibi & in itinere suo) in the statute of Magna Charta, cap. 12. shall be taken largely and beneficially; for they may not only adjourn before the same justices in their circuit, but to Westminster, or Serjeant's-Inn, or any other place out of their circuit, by the equity of this statute, and according as has been always used. 2 Inst. 26.

S. P. Br.  
Assise, pl.  
386. cites  
5 E. 4. 111.  
where it  
was done.

2. Justices of assise may adjourn the parties before themselves *from day to day, and as well after verdict as before, and from this county into another county, and to Westminster.* Br. Adjournment, pl. 34. cites 48 E. 3. 7. and 47 Ass. 1. accordingly.

— S. P. and at every day they shall be demandable. Br. Assise, pl. 32. cites 47 E. 3. 1, 2. But Brooke says, this seems to be before verdict, and contrary after verdict.

3. *In general assise they shall be adjourned by proclamation till the next assises.* Br. Assise, pl. 401. cites 32 H. 6. 10.

### (K) In what Cases.

1. **I**N *attaint* process continued till they were adjourned before S. and T. at Cant. by nisi prius; quod nota. Br. Adjournment, pl. 10. cites 6 Ass. 7.

2. The jury appeared between the king and the party upon issue, and because the king's attorney was sick, the court respited the jury for 4 days in B. R. quod nota; and this by adjournment. Br. Adjournment, pl. 25. cites 4 H. 7, 8.

For more of Adjournment in general, see *Assise, Courts, Sessions*, and other proper titles.

### (A) Admittance in Pleadings. What is. And the Effect thereof.

1. **I**F a man distrains for my rent and gets seisin, and I release to him, this is no bar to me in avowry upon the ter-tenant for the same rent; for the release is no admission of disseisin. Br. Avowry, pl. 134. cites 15 E. 4. 8. per Littleton.

2. *Contra* if I bring assise or other action against the pernor; per Littleton. Br. Avowry, pl. 134. 8.

S. P. as  
trespass vi  
& armis  
against the  
lord, and  
he admits

3. Though the party admits an ill writ, yet the court shall abate it, if they see it, as where the original was ex assignatione where it should be ex dimissione. Br. Error, pl. 105. cites 38 H. 6. 30.

it, yet the court shall abate the writ. Arg. Cro. E. 425. cites 10 E. 4. and 28 H. 8. 13.

4. *Attaint by 2 upon assise passed against them, one of the petit jury pleaded outlawry in the one of the plaintiffs before the date of the assise; and it was held that he could not; for it is dilatory, and the tenant shall not have the plea, because he did not plead it in the assise, but admitted both of the plaintiffs to be able.* Br. Non-ability, pl. 27. cites 2 H. 7. 7.

5. The admittance of the party can not give jurisdiction to the court of admiralty, where of right it has none; for that will be an incroachment upon the common law. Admitted per cur. 12 Rep. 77.

6. *Non denial* is only an admission of things which are materially alleged; per Holt Ch. J. Skin. 690. Mich. 8 W. 3. B. R. in case of the King v. the Bishop of Chester.

7. An admittance by pleading to an indictment does not make good the indictment, as it would a declaration; per Holt Ch. J. 11 Mod. 227. 8 Annæ, B. R. in case of Queen v. Jennings.

For more of Admittance in general, see **Copyhold**, and other proper titles.

## (A) Ad Quod Damnum.

1. 27. E. 1. stat. **O**RDAINS, that such as would purchase  
2. s. 1. new parks shall have writs out of Chancery to inquire concerning the same.

2. S. 3. And persons dwelling beyond sea that have lands or rents in England, and will purchase letters of protection, or to make general attornies, they shall be sent into the Exchequer, and there make fines, and from thence shall be sent unto his chancellor or lieutenant. [ 126 ]

3. S. 4. In like manner they shall do that will purchase any fair, market, warren or other liberty. Also such as will purchase attorning of their debts shall be sent into the Exchequer.

4. This writ shall issue where an abbot aliens in mortmain. Br. Ad quod damnum, pl. 1. cites F. N. B. 221.

5. Writ of ad quod damnum was used in ancient time, where the tenant of the king aliened, though he had licence, and notwithstanding that he retook estate again. Ibid.

6. And it lies upon grant of liberties made by the king, and upon pardon of mortmain, and upon pardon of intrusion, and upon office of fee granted, as fostership, &c. And it lies upon assart of wood, and

See F. N. B. 222. (A) to 226. (C)

See F. N. B. 224. (H) &c.

See F. N. B. 226. (C) to the end of (H).

and upon gift of waste land, and upon lease for years of it, or upon grant of free chase. Ibid.

10 Rep. 142.

a. in case of the Isle of Ely S. C. cited per cur. and also the register, fol. 252. in the writ of Ad quod damnum.

7. If there be an *ancient trench or ditch coming from the sea*, by which boats and vessels used to pass the town, if the same be *stopped* in any part by outrageousness of the sea, and a man will *sue to the king to make a new trench, and to stop the ancient trench*, &c. they ought first to sue a writ of ad quod damnum, to enquire what damage it will be to the king or others. F. N. B. 225. (E).

8. And if the king will grant to any city the *assise of bread and beer*, and the keeping of weights and measures, an ad quod damnum shall be first awarded, and when the same is certified, &c. then to make the grant. F. N. B. 225. (F).

9. The river *Thames is an highway* and cannot be diverted without an Ad quod damnum, and to do such a thing ought to be by patent of the king. Noy. 105. Hind v. Manfield.

Cro. C. 266.

pl. 16. Mich. 8 Car. B. R. the S. C. accordingly.

10. If upon the *return* of an Ad quod damnum it appears to be *Ad damnum vel præjudicium of no man*, the king may then licence the stopping up of an ancient highway, or diverting a water-course, or part of it, for the concern is then wholly his own; but without his *licence* it can never be done, though a better way be set out, and so returned upon an Ad quod damnum. Per Vaughan Ch. J. Vaugh. 341. cites Cro. C. 266, 267. the King v. Ward.

So if the king will, ex speciali gratia licence a mortmain, the chancellor need not issue any Ad quod damnum; for the king, without words of non obstante, is sufficiently apprised by asking his

11. If an Ad quod damnum issues to enquire Ad quod damnum vel præjudicium, a license for a mortmain will be; one *inquiry* is, Si patria per donationem illam magis solito non oneretur, &c. Though the return be that by such licence patria magis solito oneretur, yet the licence if granted will be good which shews that clause is for information of the king; that he may not licence that which he should not, and not for restraint to hinder him to licence what he should. For by Fitz. F. N. B. 222. (D) the usual licence is now with Et hoc absque aliquo brevi de ad quod damnum. And when the king can licence without any writ of Ad quod damnum, he may, if he will, licence, whatever the return of the writ be. Though it be said in the case of monopolies, that in the king's grant it is always a condition expressed or implied, Quod patria plus solito non oneretur, but that seems but gratis dictum. Per Vaughan Ch. J. Vaugh. 345.

licence to do a thing which at common law might be done without it, that now it cannot be done without it. And that is all the use of a non obstante; per Vaughan Ch. J. Vaugh. 345.

3 Lev. 220.

Trin. 1 Jac. 2. S. C. affirmed in the house of lords.

12. An Ad quod damnum *fraudulently executed* (as where it was for a market, and though the next market-town was within a mile and an half of it where the new market was to be, yet the writ was executed many miles distant) is a ground for a scire facias to repeal the grant. 2 Vent. 344. in Canc. Hill. 31 & 32 Car. 2. the King v. Butler.

[ 127 ]

An Ad quod damnum

13. 8 & 9 W. 3. cap. 16. §. 6. for enlarging common highways, enacts, *That where any common highway shall be enclosed after a writ of Ad quod damnum issued and executed, any person injured*

or

or aggrieved by such inclosure may complain to the justices at the quarter-sessions next after such inquisition, who may hear and finally determine the same, &c. But if no such appeal be made, then the said inquisition and return, recorded by the clerk of the peace, to be for ever binding.

was sued out, and an *Ad nullius dampnum* returned; and an order there-

upon made for the inclosing such an ancient highway, and setting out a place for another in such a place. On appeal from this order to the sessions, the inclosure is declared to be a great nuisance to the whole country. Several exceptions were taken to this order. 1. That it did not appear to have been at the next quarter-sessions after the order made. 2. An exception was taken to the whole purport of the order; that it did not appear by it, what the way to be inclosed was, or what the new way. So that there was no certainty what the subject matter of appeal was; for this being a method ordained by the statute for making a final end of the matter, it ought to appear very certain. It was held that this clause does not alter the nature of the writ of *Ad quod dampnum*, nor the proceedings thereupon; that the writ when executed is to be returned into Chancery, and the sheriff is to return the inquisition indilate, and if the queen thereby sees that there is no harm in the inclosing, she may grant leave to do so, and in order thereto the inquisition must find it *Ad dampnum nullius*, and there can be no foundation of inclosing without such return; and that though it be found and returned *Ad dampnum nullius*, yet none can lawfully inclose without license or grant to inclose the old way; for the authority is not from the inquisition, but from the licence; and the appeal must be brought at the next sessions after the inquisition taken, and it must be by some person grieved; that in the present case there being no licence it is not by the authority of the statute, and therefore not such as obliges the party to appeal; and therefore, per tot. cur. the inquisition was quashed. 7 Mod. 45. Trin. 1 Ann. B. R. the Queen v. Ogden.

For more of *Ad quod Dampnum* in general, see *Portmain*, and other proper titles.

## Advowson.

### (A) What Words will pass it.

1. **A** DVOWSON will pass by the grant of the church. Pl. S. P. per C. 157. b. cites 7 E. 3. and in marg. cites 7 E. 3. 5. Coke Ch. J. Roll Rep. 237. Mich. 13 Jac. B. R.—Yelv. 61. cites 6 E. 3. S. P. (but the reporter adds a nota, that Herle there said this was in ancient time; ergo, it is not so now; to which the court seemed to agree.

2. *Advocatio medietatis ecclesie* is, when there are 2 several patrons and 2 several incumbents in one church, one of one moiety, and the other of the other, and one part of the church and town allotted to the one, and the other part to the other. But in the case of parceners agreeing to present by turn, where there is only one church and one incumbent, it is *medietatis advocacionis ecclesie*. Co. Litt. 17. b. 18.

The moiety or 3d part of the church, is where parceners or jointenants present jointly, every one has a part of the

church; but where two churches are united and consolidated, and the patrons agree to present, the one 2 turns, and the other a 3d turn, there either of them has the intire church for the time. Cro. E. 636. pl. 22. Trin. 41 Eliz. C. B. Windsor v. Loveday & Fletcher.

3. *Appropriation*, nor the advowson of it, will not pass under the name of an advowson; but advowson will pass by name of *Tenement*; per cur. Hob. 304. in case of London v. Collegiate Church of Southwell, cites 33 E. 3. where the King granted licence to purchase lands and tenements in mortmain, to the value of 100s. and allowed for advowsons, and the essoign is *De placito terræ*.

4. It is contrary to the nature of an advowson to be a thing of profit regularly, yet it may be yielded in value on a *voucher*, or may be *assets* in the hands of an executor. Hob. 304. London v. Collegiate-church of Southwell.

Advocatio

quartæ

partis. See

D. 78. b.

pl. 44.

Mich. 6 E.

5. He that has only the 4th part of an advowson, may levy a fine per Nomen advocacionis quartæ partis ecclesiæ, per Thorp & Finch; but per Wich, it shall be *De tertia [quarta] parte Advocacionis ecclesiæ*. Br. Presentation, pl. 7. cites 45 E. 3. 12.

6. Price v. Ld. Windsor.—Dyer said, that the best pleading is to say that Fuit seifitus de 2 partibus advocacionis, & J. S. de tertia parte advocacionis. D. 299. b. pl. 31. Pasch. 13 Eliz. in case of Eveleigh v. Turner.—It should be *Advocatio duarum partium ecclesiæ*, and not *Dux partes advocacionis*. 2 Le. 36. in pl. 45. Mich. 30 & 31 Eliz. C.B. per cur. obiter.

S. C. cited

Arg.

Bridgm.

95.—

S. C. cited

per cur.

Hob. 304.

in pl. 382.

Mich. 16 Jac.

—S. P. agreed Arg. Mo. 176. pl. 310. Mich. 24 Eliz. in Robert's case.—S. P. accordingly by Jones J. Jo. 23. Hill. 14 Jac. cites D. 350. and 10 Rep. [65. b.] Whistler's case.

6. A lease was made of *all hereditaments situate, lying, and being in B.* and the question was, whether the advowson of the vicarage passed by that word (*hereditament*;) and the court held that it did pass; for though it does not lie in livery, nor is it visible or palpable, yet in a writ of right of advowson the view shall be given in the church. D. 323. b. pl. 30. Pasch. 15 Eliz. Anon.

Cro. E. 16.

163. pl. 4.

Anon. S. P.

and seems

to be S. C.

and held

according-

ly, because

the vicar-

age is ano-

ther thing

than the advowson, and every thing must pass by its proper name.—S. C. cited D. 350. b.

Marg. pl. 21. by name of Denny v. Astill.

7. The king was seised of the rectory of D. and of the advowson of the vicarage of D. and granted the said rectory with the appurtenances, *ac etiam vicariam ecclesiæ præd.* And per tot. cur. the advowson of the vicarage did not pass by these words in the case of the King, nor even in the case of a common person; but Walmesley J. held that if he had granted *Ecclesiam suam de D.* it might have been otherwise. Le. 191. pl. 272. Mich. 31 & 32 Eliz. C. B. Ashegell v. Dennis.

8. After the taking a second benefice, the first is so void that it cannot pass by the name of Advowson; per Noy, Arg. Litt. Rep. 303.

## (B) Grants of the next Avoidance. Good. And Pleadings.

1. **G**RANT of the free disposition of the church of B. is a good grant of the next avoidance. Br. Quare Impedit, pl. 133. cites 14 E. 4. 2. per Littleton.

2. In Quare impedit the plaintiff intituled himself by grant of a stranger *de proxima advocacione cum acciderit*, and did not shew in his



his count *that this was the next avoidance*, by which, &c. Brian [awarded the defendant to] answer. Brooke says, Quod mirum; for at this day the common use is of necessity to allege, that it is the next avoidance. Quod nota. Br. Quare impedit, pl. 135. cites 19 E. 4. 1.

3. In Quare impedit, where the *tenant of the king grants proximam præsentationem, and dies*, this shall hold place against the king, and the bishop may present by lapse upon the king, before office found; but when office is found, the king shall have the presentment, and the incumbent shall be removed. Br. Presentation, pl. 24. cites 14 H. 7. 21.

4. A. granted the 3d presentation to an advowson, and died. His *feme was endowed of the 3d presentment*. The grantee shall have the 4th presentment; by Anderson Ch. J. Cro. E. 791. pl. 33. cites 15 H. 7. 3.

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Cro. J. 691.  
Mich. 22  
Jac. in pl. 4.  
Hutton J.  
denied this  
to be law.

5. If a man grants *proximam præsentationem* to A. and *after, before avoidance, grants proximam præsentationem* of the same church to B. the second grant is void; for it was granted over by the grantor before, and he shall not have the second presentment; for the grant does not import it. Br. Presentation, pl. 52. cites 20 H. 8.

Jenk. 236.  
pl. 13. S. P.  
according-  
ly.—The  
corporati-  
on of B.  
being seized

of an advowson, granted the first and next presentation to S. and afterwards granted *primam & proximam advocacionem* to the plaintiff, the church became void, and S. presented his clerk, who was admitted, instituted, and inducted; and then the church became void again, and the plaintiff presented, &c. Resolved by 3 judges, the 2d grant was void; for when the patron had granted the first and next presentation to one, he cannot grant it to another, because it is expressly contrary to his grant; but perhaps if the 1st deed had been lost before any benefit taken of it, and so as it could not be pleaded, the 2d grant might have been good. But Anderson held that the presentation should pass, and that so was the intention of the grantor, and that it may well stand with the law. As where 2 parceners make composition to present by turns, the eldest first, and the younger afterwards, if the youngest grants *primam & proximam advocacionem*, it is in law but the 2d only, and yet the grant is good enough; but by the opinion of the other justices it was adjudged for the defendant. Cro. E. 790. 791. pl. 33. Mich. 42 & 43 Eliz. C. B. Williams v. the Bishop of Lincoln.

6. During an avoidance the patron granted *primam & proximam nominationem præsentationem & institutionem, cum primo & proxim' vacaverit*. It was held by Fitzherbert and Shelly, that the grantee shall not have the presentation to this avoidance, but to the next he shall. D. 26. a. pl. 165. Hill. 28 H. 8. Anon.

Jenk. 236.  
pl. 13. S. P.  
& S. C.—  
But where  
the patron  
granted  
*primam &*

*proximam præsentationem & advocacionem ecclesie de C. & Jus præsentandi ad eandem jam vacantem, ita quod licebit eidem the grantee ad eandem ecclesiam idoneam personam, &c. hac unica vice tantum præsentare, &c.* Harper, Weston, and Dyer held the grant of the present avoidance void, because it is a mere personal thing annexed to the person of him who was patron in expectancy ad tempus vacationis; and likewise a thing in action, and in effect the fruit and execution of the advowson, and not any advowson, and yet the executors shall have it by privity of the law; and to this opinion Catlyne Ch. J. and Carus, and Southcote J. agreed; but Welshe, Saunders Ch. B. and Whiddon J. e contra; but all agreed that the queen may make such grant, though it be a thing in action. D. 282. b. 283. a. pl. 28. 29. Pasch. 11 Eliz. Anon.—S. P. and held that when the church is void, it is not grantable but is a Chose en action. Quære. And. 15. pl. 32. Agard v. the Bishop of Peterburgh; and says that the like case was adjudged Trin. 10 Eliz. in case of Stephens v. Disley.—Mo. 89. pl. 222. Trin. 10 Eliz. Stephens v. Clerk & Disley, adjudged against the plaintiff.—S. C. cited Bendl. 193. in Marg. pl. 230. says the opinion of Weston was, that the words (*jam vacantem*) were only to shew what church was intended, and that Dyer held that those words were void [or surplusage.]

7. In a Quare impedit the plaintiff declared upon a grant of the next avoidance; and upon demanding oyer of the deed, the plain-

Cro. F. 163.  
pl. 8. Crisp's  
case, S. C.

accordingly; and ruled clearly without argument.

S. C. cited 5 Rep. 15. a. as adjudged that grant of a next avoidance of a

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benefice, by the dean and chapter, was within the purview of this act.

tiff shewed to the plaintiff's father a letter written by the patron, that he had given his son, the plaintiff, the next avoidance. Adjudged that the grant was not good without a deed. Owen 47. Mich. 31 & 32 Eliz. Cripps v. Archbishop of Canterbury.

8. The dean and chapter of H. granted the next presentation of a church to B. B. and the question was, whether this was a good grant to bind the successor by the statute 13 Eliz. And Walmesley and Owen held that it was not; for though it was not a thing of which any profit might be made, nor any rent reserved, yet it is an hereditament, whereof the statute intends that no grant shall be made; but Anderson Ch. J. e contra: for the statute intends not to restrain them, but for such things which are for profit; and by reason thereof prejudice may accrue to the successor, which cannot be in this case. Beaumont J. was absent; & adjournatur. Cro. Eliz. 440. pl. 2. Mich. 37 & 38 Eliz. C. B., Dean and Chapter of Hereford v. Ballard.

9. Lessee of a rectory for 15 years, to which the advowson of a vicarage was appendant, granted the next presentation to the vicarage to B. if it should happen to be void during the said term of years then in esse, and died; his administrator surrendered the term to another, who accepted it. Resolved, that though it was upon express limitation of the vicarage's becoming void during the term, and not during the years, yet the grant of the next presentation was good, because the grantor shall not derogate from his own grant, and therefore the term, in some respect, shall be taken to continue for the benefit of the grantee. 8 Rep. 144. Trin. 8 Jac. Davenport's case.

Jenk. 301. pl. 69. S. C. accordingly.

10. A. was seised of an advowson, and the church being then full, granted *Quod ipse ad dictam ecclesiam clericum suum præsentare possit quandocunque & quomocunque ecclesia vacare contigerit pro unica vice tantum; ac insuper voluit & concessit, that this grant should remain in force quousque clericum, &c. shall be admitted, &c.* by his presentment, he must present upon the very next avoidance, which, if he neglects, he hath lost the benefit of his grant; and judgment affirmed in error. Bulst. 26. Trin. 8 Jac. Starkey v. Poole.

Brownl. 165. Wivel v. the Bishop of Chelster. Pasch. 12. adjudged accordingly.

11. Tenant in tail of an advowson, and his son and heir joined in a grant of the next presentation. The tenant in tail died. Adjudged that the grant was utterly void as to the son and heir, because he had nothing in the advowson, neither in possession nor right, nor in actual possibility, at the time that he joined with his father in the grant. Hob. 45. pl. 48. Sir Marmaduke Wivill's case.

12. An incumbent of a church purchased the advowson in fee, and devised that his executor should present to it after his death; and then, by the same will, he devised the inheritance in fee to another. The question was, whether this was a good devise of the next avoidance, because instantly, upon the death of the incumbent, when this will should take effect, the church would be void, and so a thing in action, and not devisable; but adjudged that it is good, according to the intention of the testator expressed in his will. Cro. J. 371. pl. 5. Pasch. 13 Jac. B. R. Pynchyn v. Harris,

13. 12 *Ann. stat. 2. cap. 12.* Whereas some of the clergy have procured preferments for themselves by buying ecclesiastical livings, and others have been thereby discouraged; Be it therefore enacted by the authority aforesaid, That if any person, from and after 29 Sept. 1714, shall or do for any sum of money, reward, gift, profit, or advantage, *directly or indirectly, or for or by reason of any promise, reward, gift, profit, or benefit whatsoever, directly or indirectly, in his own name, or in the name of any other person or persons, take, procure, or accept the next avoidance of or presentation to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, and shall be presented or collated thereupon, that then every such presentation or collation, and every admission, institution, investiture, and induction upon the same, shall be utterly void, frustrate and of no effect in law, and such agreement shall be deemed and taken to be a simoniacal contract; and in such case the queen may present; and such person disabled to enjoy the same, and to be subject to the ecclesiastical laws, as if such agreement had been during a vacancy.*

(C) Advowson. Demanded by what Writ. [ 131 ]

1. *Præcipe quod reddat* lies of an advowson. Thel. Dig. 67. lib. 8. cap. 5. f. 6. cites Mich. 34 E. 1. Brief 855.

See tit. Præcipe quod reddat.

da, pl. 4. contra, and the notes there.—A man shall not have other præcipe quod reddat of an advowson than writ of *right of advowson*; for a man shall not have *formædon* of an advowson. Thel. Dig. 67. lib. 8. cap. 5. f. 7. cites Mich. 4 E. 3. 162. and says see Brooke *Præcipe quod reddat*, 10 & 17. and that so it was affirmed by Hank. Hill. 14 H. 4. 33. of an advowson in gross; but several fines were levied of advowsons, and cites the Register 165.

2. But it ought to be of the advowson of *some church, or of the 4th part of the tithes of some church* at the least, &c. Thel. Dig. 67. lib. 8. cap. 5. f. 6. cites Mich. 18 E. 2. Brief 825. where writ brought *De Advocatione decimarum unius carucate terre cum pertinentiis* was abated, and says see the Register, fol. 29.

3. It was said that a man shall have *scire facias* of an advowson, and also a *cessavit*. Thel. Dig. 67. lib. 8. cap. 5. f. 8. cites Pasch. 43 E. 3. 15.

Scire facias of an advowson out of a fine,

was granted. Thel. Dig. 67. lib. 8. cap. 5. f. 9. cites Pasch. 13 E. 3. Scire facias 118. And out of fines and other records oftentimes in the titles of *Quare impedit*, and *scire facias* of Fitzh.

*Writ of dower* was maintained of an advowson. Thel. Dig. 67. lib. 8. cap. 5. f. 9. cites Trin. 7 E. 3. 325. and Pasch. 13 E. 2. Dower 161. 163. Hill. 17 E. 2.

4. It was said by Kirton, that tenant for life shall have *Quod ei deferret* of an advowson, and that writ of *Warrantia chartæ* lies of an advowson. Thel. Dig. 67. lib. 8. cap. 5. f. 8. cites Mich. 43 E. 3. 25. And says see Trin. 5 H. 7. 37. of the *cessavit*, and *formædon* and *cessavit* was maintained of an advowson, Hill. 22 E. 3. Cessavit 46. and Pasch. 32 E. 3. Cessavit 24.

## Age.

### (A) In what Actions merely, *without Plea*, the Parol shall demur.

But in a formedon in the descender, brought by an infant, if the *seoffment* of his ancestor

[ 1. ] IN a *formedon in descender* the parol shall not demur for the non-age of the demandant, *unless something be pleaded to which he cannot be party to try it during his non-age.* 17 E. 3. 59. Age 8. 18 E. 3. Age 11. Co. 6. Markall 4. b. 13 E. 3. Age 96. adjudged, because this is a writ of possession. \* 2 E. 3. 59. b.]

[ 132 ] be pleaded in bar with warranty and assents, or a collateral warranty without assents, this case is not within this statute for two causes. 1. That is an *action ancestrele droiturele*, for nothing descended but a right, and therefore had not any freehold and inheritance at the time of his death, and therefore out of the letter and meaning of this act. 2. The *formedon in the descender* is in nature of his writ of right; for the issue in tail can have no writ of an higher nature, and therefore not within the statute of Glouc. for seeing that *act* gave the infant a trial during his minority, it gave it him in such actions as he might be foreclosed of his right; but though he were barred in any of the said actions during his minority, he might at his full age have recourse to his writ of an higher nature, so as he should not be remediless, or any final judgment given against him during his infancy. . 2 Inst. 291.

\* See (D) pl. 1. S. C.

S. P. because he demands fee simple of the seisin of his ancestor, and

[ 2. In a *formedon in reverter* brought by the heir of the donor, the parol shall demur for the non-age of the demandant, because he demanded a fee, and this is a writ of right. 18 E. 3. Age 11. adjudged. Co. 6. Markall 3. 48 E. 3. 33. b. \* D. 3. 4. Mar. 137. 24. 12 E. 2. Age 145. adjudged.]

there he ought to allege the esplees in the donor. 6 Rep. 3. b. and says that with this agrees 18 E. 3. Age 11. and 12 E. 2. Age 145.

\* Per Dyer in Basset's case.

But in *formedon in remainder*, though he demands fee

[ 3. [So] in a *formedon in the remainder* of a remainder tailed to his ancestor, the parol shall demur for the non-age of the demandant. 3 E. 3. Itinere Nottingham, Age 72. adjudged.]

simple, yet because his ancestor, whose heir he is, never had seisin, nor took any esplees, (so that in such case he shall allege esplees only in that particular tenant that had the estate, on which the remainder depended) therefore the tenant (without plea) cannot pray that the parol demur, the remainder not having been in possession of any of his ancestors, and the demandant himself was the first in whom it vested. 6 Rep. 3. b. 4. a. in Markhal's case, says this was the true reason of the judgment in the case of Sands v. Bray.

The chief reason that the parol shall not demur in *formedon in remainder*, is, because it is in a suit to recover seisin and possession to him, where none of his ancestors, whose heir he is, had it before him. D. 133. pl. 18. Hill. 3 & 4 P. & M. in Basset's case.

In a *formedon in remainder* brought by an infant, of a remainder limited to his father and his heirs, (whose heir he is) the tenant, without any plea pleaded, prayed that the parol might demur; but after great deliberation the same was not allowed; for the granting the parol to demur for non-age of the demandant is in his (the infant's) favour, and here it would be to his prejudice, when upon the death of his ancestor the land descends to him, to keep him out of the possession thereof till his full age. 6 Rep. 3. Pasch. 35 Eliz. C. B. Markal's case.

See Mich. 2 E. 3. 36. a. pl. 33.

[ 4. In a *sur cui in vita* the parol shall demur for the non-age of the demandant without any plea pleaded. 2 E. 3. \* 63. adjudged.]

\* This is misprinted, there not being so many pages.

[ 5. In

[5. In a writ of *warranty of charters* brought by an infant the parol shall not demur for his non-age, though the warranty was made to his ancestor. Temp. E. 1. Age 129.]

See (D) pl. 7. S. C. that if defendant denies the deed, the parol shall demur.

[6. In a writ of *right of ward* the parol shall not demur for the non-age of the demandant, though it be a writ of right. Tempore E. 1. Age 128. adjudged.]

lord shall recover against him by the statute of Marlebridge, cap. 6. 2 Inst. 112. Covenant 7. The heir shall not have his age, but the cites 18 E. 3.

[7. In a writ of *right of possession* of the demandant himself, the parol shall not demur for the non-age of the demandant, because it is brought of his own possession. 41 E. 3. Age 38. adjudged.]

S. C. cited 6 Rep. 3. b. in Markal's case.

— Entry sur disseisin

by an infant of his own seisin, the tenant pleaded a feoffment of N. the ancestor of the infant plaintiff whose heir he is, with warranty, and prayed that the parol demur for the non-age of the plaintiff; and per Littleton, the parol shall not demur; for the action is of the proper seisin of the demandant, and not as heir, and this is at common law, and not within the stat. of Gloucester, which speaks of writs of Aiel, Befail, and of Cosinage, nor in Westm. 1. which speaks of the heir of the disseisee or disseisor. Quære. Br. Age, pl. 67. cites 12 E. 4. 17.

[133]

8. The court *ex officio* put the parol without day without plea or prayer of any, where the demandant was an infant. Br. Age, pl. 71. cites 5 E. 3. It. Bed.

9. In formedon in descender in which the demandant shall not recover the mere right, but a limited estate per formam doni of the seisin of the donee, the parol shall not demur by the prayer of the tenant, but he shall be answered within age, unless any thing be pleaded against him to which he cannot be party to try within age. 6 Rep. 4. b. in Markal's case, and says, that with this agrees 8 E. 3. 9. 12 E. 4. 17. 34 H. 6. 3. 40 E. 3. 42 E. 3. 13 E. 3. Formedon 96. 3 E. 2. ibid. 133.

10. But in *assise and assise of Mortdancestor* brought by infant, there because there is a jury the first day, and the jury shall inquire of the circumstances, the parol upon any plea pleaded shall not demur. 6 Rep. 4. b. cites 8 E. 3. 36.

11. Where the parol ought to demur for the non-age of the infant, the court ought to award that it shall demur, though the tenant would answer. 6 Rep. 5. in Markal's case, cites 8 E. 3. 10.

12. If an infant aliens within age, and dies within age, and his heir brings a *dum fuit infra ætatem*, the tenant may pray that the parol demur, and yet the action did not descend; for it lies not for him who aliened, because he died within age, and the writ says *Dum fuit infra ætatem*. 6 Rep. 4. a. in Markal's case [by the Reporter, as it seems.]

See S. P. admitted. D. 204. pl. 10. Mich. 1 & 2 P. & M. in case of Anderson v. Ward.

13. So if the heir brings writ of *Non compos mentis*, the tenant may pray that the parol demur, and yet a naked right, and no action, descends. 6 Rep. 4. a. in Markal's case, by the Reporter, as it seems.

14. If infant has a *seigniorie by descent*, and the tenant ceases or disclaims in avowry made of his own seisin, or if he is bastard, or attaint of felony, or dies without heir, he shall have cessavit, right upon disclaimer,

6 Rep. 3. b. S. P. accordingly, in Mark-



hal's case,  
obiter.

claimer, and writ of escheat to demand the land in lieu of the services; and the parol shall not demur, because no right ancestor descends to him for the land, and it is but reason that he have the services paid to him, or the land in recompence, &c. D. 137. b. pl. 25. Hill. 3 & 4 P. & M. in Bassett's case.

Dal. 37. pl. 4. Saunders v. Bray, S. C. and Dyer and Weston held, that the parol should not

15. In *sci. fa. to execute a fine, limiting a remainder to the plaintiff's grandmother, whose heir, &c.* The plaintiff appeared by guardian, being within age, and therefore the defendant prayed that the parol should demur, but was ordered to answer over, because he did not plead the deed of his ancestor. And. 24. pl. 52. Pasch. 4 Eliz. Sands v. Bray.

demur for non-age of the demandant, but where he demands of the seisin of his ancestor, as in writ of Aiel, Cofinage, or Entry sur Disseisin, whereas here it appears that no possession ever was in the demandant's ancestor; besides, he demands not any land, but only the execution of a fine, whereas the parol shall demur in no case but where land is demanded; and defendant was awarded to answer.—Kelw. 204. b. pl. 5. S. C. in totidem verbis.—D. 210. b. pl. 26. S. C. but S. P. does not appear.—D. 215. b. pl. 53. S. C. but S. P. does not appear.—Mo. 16. pl. 59. Anon. but seems to be S. C. and S. P. accordingly, though the infant had the remainder by descent, and though the particular estate was determined in the time of the infant's father; but that if the defendant had pleaded the deed of the ancestor of the infant in bar, the parol should demur.—Bendl. 121. pl. 152. S. C. that the *sci. fa.* was brought by the remainder-man in fee of a remainder in tail to his grandmother, so that the plaintiff is in a manner a purchaser; For the estate tail on which this remainder depended was determined in the time of the plaintiff's father, and not before, and the defendant not pleading any warranty of the plaintiff's ancestor with assets, he was ordered to answer over.—Mo. 35. pl. 114. S. C. in the same words with Dal. 37. pl. 4.—6 Rep. 3. a. b. cites S. C. as adjudged accordingly after several arguments and great deliberation, and that the record of the judgment was shewn. And for the better apprehending the true reason of this judgment, the rules of the common law are first to be observed, and then the alterations made by statute. And as to the first, every *real action* is either *possessory*, viz. of his own seisin or possession, or *ancestral*, viz. of the seisin or possession of his ancestor. And generally in all real actions possessory, though he has the land by descent, and the tenant pleads the deed of his ancestor with warranty, the parol shall not demur for his non-age; For the law presumes the granting it where the demandant is an infant, is for his benefit, least for want of knowing his estate, and the truth of the matter, he may be prejudiced in his right descended to him from his ancestor. But when the ancestor dies seised, and the land descends, and he takes the profits, it will be prejudicial to the infant to lose his possession, and be kept out till his full age. But when a naked right only descends, he is at no such prejudice.

It is not called Action Ancestral because the action descends,

16. Actions *ancestral* are of two sorts, viz. one is called Ancestral *Droiturel*, because nothing descends from the ancestor but a naked right; and the other is called Ancestral *Possessory*, because the ancestor died seised in possession, and the same land descended. 6 Rep. 3. b. Pasch. 35 Eliz. in Markhal's case obiter.

but because the right descends from the ancestor, for which action of the seisin of the ancestor is given to the heir. 6 Rep. 4. a. in S. C.—And therefore if an infant aliens within age, and die within age, and his heir brings a writ of *Dum fuit infra aetatem*, the tenant may pray that the parol demur, and yet the action does not descend; for it does not lie for the alienor, because he died within age, and the writ was *Dum fuit infra aetatem*. So if the heir within age brings writ of *Non compos mentis*, the tenant may pray that the parol demur, and yet a naked right, and no action descends. 6 Rep. 4. a. in Markhal's case.

17. As if infant brings a writ of right as heir to his ancestor, and lays the esplees in his ancestor, the tenant (without any plea) may pray that the parol demur. 6 Rep. 3. b. in Markal's case obiter.

18. In all cases when a naked right in fee simple descends from any ancestor (who was once in possession) to an infant, there is any action ancestral brought by him, the tenant without any plea pleaded may



may pray that the parol may demur. 6 Rep. 3. b. Pasch. 35 Eliz.  
C. B. in Markhal's case.

## (A. 2) Age. By Statute of Gloucester.

1. Stat. Gloucester, *If a child within age be holden from his heritage after the death of his father, cousin, grandfather, or great grandfather, whereby he is driven to his writ,* \* In mort-  
dancestor of  
the seisin of  
his father, a  
release of his  
uncle with

warranty was pleaded in bar, and prayed that the parol demur, and the other said that this statute is, that in favour of an infant the inquest shall be taken immediately, and it was answered, that the statute is in writs of Aiel, Befail, and Cofinage only. But note, that the statute is, that if an infant be held out of his heritage after the death of his father, grandfather, or great grandfather, &c. quod nota. Br. Parol Demur, pl. 15. cites 8 Aff. 12.

Some MS. of this chapter before printing came to us omitted these words (his father) which being shewed to the judges in 8 E. 3. they were of opinion that a writ of Mortdancestor was not within this law, and Fleta following that error rehearsing this chapter, saith, Apud Gloc' provifum fuit, si heres infra ætatem petat seisinam consanguinei, avi sui, vel proavi, & excipitur contra eum, &c. omitting patris sui; but in the print the former error is amended, and accords with our later books. 2 Inst. 290.

And it is not to be thought, that the wisdom of the parliament would provide for the seisins of them that were so far remote. as in the writ of Refail and Cofinage, and leave unprovided the seisin that was in the father, the next ancestor of all, &c. 2 Inst. 290.

By the words (after the death of his father) is necessarily implied the assise of mortdancestor, and the case of the father is here put for an example, for it extends to the cases of the mother, brother, sister, uncle, or aunt, nephew or niece, after the dying seised, of all which persons a writ of mortdancestor does lie, for all the said cases are in equal mischief with the case of the father, and therefore are within the same remedy. 2 Inst. 291.

At common law in writs of right, entry sur disseisin, formedon in reverter and descender, dum fuit infra ætatem, and non compos mentis, and all other actions real founded on a right descended to an heir within age in which seisin and esplees ought to be laid in the ancestor whose heir, &c. the tenant by exception to the person of the demandant so being within age, shall stay the parol until, &c. without any plea pleaded in bar; but the writ ought not to abate as the stat. Westminster. 1. cap. 46. supposes; and therefore Bracton lib. 5. says, that minor ante tempus agere non potest infra ætatem, maxime in causa proprietatis, nec etiam convenire, sed differetur usque ad ætatem, sed non cadet breve. Per Dyer. D. 137. a. pl. 22. 23. Hill. 3 & 4 P. & M. in Bassett's case. [ 135 ]

But at the common law it seems, that in actions ancestrel possessory, as aiel, befail, and cofinage founded on a dying seised of the ancestor where he needs not lay any esplees, there the tenant cannot pray that the parol shall demur for non-age of the demandant, without pleading a feoffment or other thing to which the demandant by reason of the tenderness of his age cannot join issue, nor shall the circumstances of things which would avoid the deed be inquired by the jury, as it should be in assise of novel disseisin or mortdancestor; and therefore the parol shall demur which is not remedied now by the statute, and the inquest shall be taken as of another man of full age. D. 137. a. pl. 23. Hill. 3 & 4 P. & M. in Bassett's case.

Note, that it was said for law in a formedon, and not denied, that formedon in reverter dum fuit infra ætatem, dum non fuit compos mentis, cui in vita, ingressu in casu proviso, & in consimili casu, and all other writs of possession are aided by this statute, that if the demandant be within age, and a feoffment of the ancestor, &c. is pleaded, they shall proceed as if the demandant was of full age, and yet the statute does not speak but of actions taken after the death of the father or grandfather, and therefore equity, &c. Br. Age, pl. 5. cites 34 H. 6. 3.—Br. Parol Demur, pl. 4. cites S. C. accordingly; but Brooke says Quære legem inde; for it seems that no action can be taken by the equity but those where the ancestor died seised.—2 Inst. 291. says, that those actions, and all actions of like nature, are neither within the mischief, nor within the letter or meaning of this act, for that none of them are actions ancestrel possessory as has been said. 2 Inst. 291.

In formedon in descender brought by an infant, it is no plea to say that the demandant is within age, and pray that the parol might demur; but if he pleads warranty of the ancestor with assets, and prays that the parol demur, there it shall demur; for he cannot try a deed nor assets of his ancestor within age. Ibid.—Br. Age, pl. 44. cites 13 E. 4. 23. S. P. for in writs of right (as this writ is) these are at common law, and out of the case of the statute; for this statute does not give remedy but in writs of aiel, befail, or cofinage, viz. writs in possession, that there the circumstances shall be inquired, contra in writs of right, as here.

Before the making this act, albeit the ancestor died seised, so as a freehold in law was cast upon the heir, yet if an stranger abated, the tenant in a mortdancestor, aiel, befail, or cofinage, might have shewn that

that the demandant was within age, and have prayed that the parol might demur until the age of the heir, as he may do when the action is *ancestral droiturel*, that is, when the ancestor has a right only, and no possession, that is, no freehold and inheritance at his death, so as no freehold and inheritance descend to the heir, but a bare right, and no possession; and so note a *diversity between an action ancestral droiturel*, and an action *ancestral possessory*. But at the common law, if in a mortdancestor, aiel, besail, or cosinage, the tenant *pleaded a feoffment, or a release from a collateral ancestor with warranty in bar, &c.* there lest the infant for want of intelligence might receive prejudice by trial thereof during his infancy, the law in his favour at the first gave him the benefit of his age, which when it was used for delay to his prejudice, this act was made for his relief therein, 2 Inst. 291.

A feoffment with warranty from the same ancestor is a bar to the assise, and

*And his adversary cometh into court, and for his answer allegeth a feoffment, or pleadeth some other thing \* whereby the justices award an inquest there, † whereas the full inquest was deferred to the full age of the infant, now the inquest shall pass as well as if he were of full age.*

no bar in the assise of mortdancestor; and therefore this is to be intended of a feoffment of a collateral ancestor with warranty, or a release with warranty from such an ancestor, or such other matter, whereunto the infant, during his minority could not answer, as hath been said at the common law; And the rule of Glanville is good, Generaliter verum est, quod de nullo placito tenetur respondere is, qui infra ætatem est, per quod possit exheredari; nec ipsi minori super recto respondebit donec plenam habuerit ætatem; And so is that of Bracton, quod minor ante tempus, &c. 2 Inst. 291, 292.

\* This error continueth still in the print; the words of the record are (whereby the justices award the age) and instead of the age, the print is (inquest) which is oppositum in subjecto, for in the writ of aiel, besail, and cosinage, there could be no inquest awarded before an issue joined; neither could any inquest in those writs inquire of circumstances (as in the assise of mortdancestor, or assise) but of the issue joined only; and this also may well be collected by our books. 2 Inst. 290.

† These words, (whereas the full inquest was deferred to the full age of the infant) are to be referred to the mortdancestor only; because in that writ there appeareth a jury the first day, as in the assise of novel disseisin; but so it is not in the aiel, besail, or cosinage, unless you will take inquest for trial, and the sense is where trial is delayed until the age of the infant, and then it may have reference to all the writs named in this chapter. So as now such pleading trials and proceedings, shall be in these four actions as if the plaintiff were of full age. 2 Inst. 291, 292.

†

## [ 136 ] (A. 3) Age. By Statute of Westminster 1.

The mischief before this act was,

3 E. 1. Stat. Westm. 1. cap. 47.

*IF any from henceforth purchase a writ of Novel disseisin,*

that if a man had been disseised, and either the disseisee or disseisor had died, their heir being within age, in a writ of entry sur disseisin brought by the heir of the disseisee, being within age, or by the disseisee or his heir against the heir of the disseisor, being within age, the parol had demurred until the full age of the heir respectively, which was a great delay, and is remedied on both parts by this act. 2 Inst. 257.

This statute is to be taken strictly. 6 Rep. 5. a. in Markal's case.

Albeit the disseisee purchased no

*And he against whom the writ was brought as principal disseisor dieth before the assise be passed,*

writ of assise of novel disseisin, yet the heir or heirs of the disseisor are within this statute; for seeing in this case here put by the makers of this law, true it is, that notwithstanding the purchase of the writ of entre sur disseisin brought by the disseisee against the heir of the disseisor, the heir should have had his age to the great delay of the demandant, this is shewed for a mischief in this particular case, to perswade that the law might be general, though no writ was brought as by the body of the act appeareth. 2 Inst. 257.

This is to be understood of a writ of entry in the

*Then the plaintiff shall have his writ of entry upon disseisin against the heir or heirs of the disseisor or disseisors (of what age soever they be.)*

per, and not in the post, for the words of the statute be (sur le heir le disseisor) which is a writ of entry in the per, and therefore if the heir of the disseisor make a feoffment in fee, and the feoffee die, dis

his heir within age, in a writ of entry against the heir, he shall have his age, for this act extends but to the heir of the disseisor, who sitteth in his father's seat, and cometh to the land without consideration; but otherwise it is of him that purchaseth the land of the heir, for he and his heirs are out of the letter and meaning of this act; the same law is of the vouchee and prie in aid within age. 2 Inst. 257.

If the feme, heir of the disseisor, taketh husband, and bath issue within age and dieth, the disseisee brings a writ of entry against the tenant by the curtesy, and he prays in aid of her within age, he shall have his age; for this is a writ of entry in the post being brought against the tenant by the curtesy, and so out of the statute. 2 Inst. 257.

If there be two brothers and a sister, the elder brother disseiseth one and dieth, and the land descendeth to his brother, and he enters and dieth seised, and the land descendeth to the sister within age; in a writ of entry by the disseisee against the sister, she shall be ousted of her age by this statute, wherein three things are to be observed. 1. That the mediate heir on the part of the disseisor is within the statute. 2. That though the sister is to make herself sister and heir to the younger brother, and not to be disseisor, for that her younger brother entered, yet is she heir within the meaning of this statute to the disseisor, and therefore to be ousted of her age. 3. That a writ of entry in the per & cui in this special case is within this act. 2 Inst. 257, 258.

Special heirs, as in gavelkind, brought English, and the sister of the whole blood are on both sides within the statute; for though they be not heirs by the common law, yet are they heirs within the intention of this law, which is to be taken benignly, being made for expedition of justice, and to oust delay. 2 Inst. 258.

In the same wise the heir or heirs of the disseisee shall have their writs of entry against the disseisors, or their heirs, of what age soever they be, if peradventure the disseisee die before that he bath purchased his writ.

Writ of entry sur disseisin, the writs supposed that the tenant disseised the

cousin of the plaintiff, and made himself heir of J. son of P. son of B. brother to him who was disseised. The tenant pleaded that the demandant is within age, and prayed that the parol demur; for the statute is intended son and heir, that by his non-age the parol shall not demur, and this demandant is cousin and heir, therefore out of the statute; and also J. and P. who survived the disseisee were of full age, to whom this action was given; judgment per Stone, The statute is general, where the heir of the disseisee brings the action against him who does the wrong, that the parol shall not demur for his non-age, wherefore answer, by which he said that he did not disseise, prist, &c. Br. Age, pl. 18. cites 21 E. 3. 27.

This is to be understood as well of the mediate as of the immediate heir of the disseisor, and therefore if there be grandfather, father, and son, and the grandfather is disseised and dieth, and the father of full age, likewise dieth, the son is within age, and brings his writ of entry against the disseisor, he is an heir within this statute; for he maketh himself heir to the grandfather, who was the disseisee. 2 Inst. 258.

So that for the non-ages of the heirs of the one party nor of the other, the writ shall not be abated, nor the plea delayed; but as much as a man can without offending the law, it must be hastened to make a fresh suit after the disseisin;

Entry in the per & cui. The

case was, disseisor had issue a son and a daughter, and died seised, and the son entered, and died seised without issue, and the daughter entered as heir, against whom the writ was brought, and she prayed her age upon this matter, where this statute is that by the non-age of the heir of the disseisee, nor of the heir of the disseisor, the parol shall not demur where fresh suit is made, and because it was shewn how the demandant made fresh suit as well against the brother, whose heir the tenant is, as otherwise, she was ousted of her age by award; for she was also heir to the disseisor, though she was not immediate heir to him; quod nota. Br. Age, pl. 22. cites 24 E. 3. 25.

Writ of entry within the degrees upon disseisin, the tenant vouched J. and prayed that the parol demur, and the demandant said, because this writ of entry is within the degrees, and he is heir to the disseisor, and this statute wills that for the non-age of the one nor the other, after the disseisin, the parol shall not demur, &c. and the other demurred because this statute says, where the action is brought against the heir of the disseisor as tenant, and this action is brought against another, and the heir is vouched, so that he is vouchee and not tenant, and therefore out of the case of the statute. Quere. Br. Parol Demur, pl. 3. cites 27 H. 6. 1.

This statute takes away the age as well of the part of the tenant as of the demandant in writ of entry sur disseisin to the ancestor, if fresh suit was made, as is adjudged in 24 E. 3. 46. For in such case because a naked right descends to the heir at the common law, the parol shall demur for his infancy; but the said act is taken strictly, and extends not to any other action than writ of entry sur disseisin. 6 Rep. 4. b. cites 46 E. 3. tit. Age 76.

At the common law, if the grandfather was disseised and brought assise, and died pending the

the writ, and afterwards the father brought writ of entry sur disseisin, and died pending the writ; in this case in writ of entry brought by the son of the disseisin down to his grandfather, the parol should not demur for the non-age of the son, by reason of the speedy and fresh pursuit which had been made. 6 Rep. 4. b. and says that with this accords 10 E. 3. 58.

\* Here (abatement) is taken for putting off the writ and plea without day until full age, but the writ is not abated.

† This (fresh suit) is not to be understood between the disseisor and the disseisee, although the disseisor continues in possession 30 or 40 years, &c. But when the disseisor dies, then is the fresh suit to be made, and that is regularly within a year and a day after the death of the disseisor; for within that time continual claim may be made, which is in law recens & continuum clamorem, and within that time an appeal of death may be brought, which is recens insecutio, & sic in multis aliis similibus. 2 Inst. 258.

This clause is to be understood of ecclesiastical persons, that be regular, and not ecclesiastical persons, that be secular, for the regular are dead persons in law, to whom no lands (as this statute speaketh) can descend after the death of any other; but to the secular, as to bishops, parsons, vicars, and the like, lands may descend, and therefore they are not within this clause, but within the former branches of this act for such lands as they are seised of to them and their heirs in their natural capacity. 2 Inst. 258.

*And in like manner this shall be observed in all points for the right of prelates, men of religion, and others, to whom lands and tenements can in no wise descend after others death, whether they be disseisees or disseisors;*

*And if the parties in pleading come to an inquest, and it passeth against the heir within age, and namely against the heir of the disseisee, that in such case he shall have an attain of the king's special grace, without giving any thing.*

## (B) In what Actions he shall have his Age.

\* S. P. but if he had been in ward of the king,

[ 1. ] **I**n writ of dower the parol ought not to demur for favour of dower, and because peradventure the feme will die before his full age. \* 5 H. 5. 13. Curia. † 17 E. 3. 59. 12 E. 4. 12. Trin. 4 Jac. B. R. between Epps and || Epps adjudged.

[ 138 ] Skene Quon. Attachiamenta, cap. 90 and 99. The law of Scotland is accordingly.]

it seems he should have had his age. See Br. Age, pl. 17. cites S. C.—Fitzh. Age, pl. 19. cites S. C.—Mo. 847. pl. 1148. cites Pasch. 35 Eliz. that feme brought dower, and all the tertenants made default, and thereupon judgment was given, and error was brought and assigned, because one of the tenants was within age; but adjudged no error.—Mo. 848. pl. 1149. Trin. 41 Eliz. Harvey's case, adjudged in error accordingly, where it was assigned that the tenant was within age, and cites Fleta, lib. 6. cap. 42. [43] That hæres minor annis 20. [21] non respondebit nisi in casu dotis; and Bracton, fol. 252. and Britt. cap. 101. fol. 217.—Same books cited by Coke Ch. J. 3 Bulst. 145.—3 Bulst. 135. Jones cited 44 E. 3. that in dower the heir shall not have his age, to which Coke Ch. J. agreed, and said it was very clear.—If dower be settled the heir shall not have his age; cited by Doderidge J. 3 Bulst. 142. as adjudged in 44 E. 3.—S. P. admitted by Coke Ch. J. 3 Bulst. 136.—In dower, if the tenant vouches the heir within age, there in favour of dower he ought to shew a deed. 6 Rep. 5. a. cites 11 E. 3. Voucher 13. 40 E. 3. 5. 50 E. 3. 25. 10 E. 3. 31.

† Fitzh. Age, pl. 49. cites S. C.

3 Bulst. 141. Doderidge J. says that 2 reasons are given in the old books, and admitted of in the later books, why age shall not be admitted in dower; 1st, because dower is much favoured in law; and 2dly, because this is a speedy suit, and therefore no delay to be admitted in it; and no mischief shall hereby come to the heir, because she shall recover a particular estate only for her life, and to be attendant upon the heir, and she is to be in of the estate of her husband; and if she shall have this favour in law when her dower is settled, she shall have this favour also in the means to come to it.—Dower is demandable against an infant, and he shall not have his age; per Williams & Tanfield, being only in court. Cro. J. 111. pl. 8. Hill. 3 Jac. in case of Smith v. Smith.

|| See tit. Error, (G. c) pl. 30. S. C.

In writ of dower, if infant be not tertenant, he shall not have his age; but otherwise if he be tertenant. Roll Rep. 325. Hill. 13 Jac. B. R. in case of Herbert v. Binion.  
See (D) pl. 1, 2, 3, 5, 6.

[ 2. If a feme brings *Quod ei deforceat* upon recovery had of land which she claims to hold in dower, the parol shall not demur, because it is of the nature of writ of dower. 44 E. 3. 43.]

Fitzh. Age, pl. 38. cites S. C.—  
S. C. cited by Doderidge J.

ridge J. 3 Bulst. 141. as ruled that the heir shall not have his age in this action, it being only to restore her to her dower.—S. P. accordingly, because the title of dower is materially in question; per Haughton; Roll. Rep. 323. pl. 31. cites S. C.—S. C. cited, and S. P. agreed, per cur. Roll. Rep. 251. Mich. 13 Jac. B. R.—S. C. cited by Haughton J. 3 Bulst. 138. and says that so is Fitzh. Dower 181. 6 H. 3. and 16 E. 3. Ibid. pl. 56.—S. C. cited by Coke Ch. J. Crooke and Haughton J. Cro. J. 393.

[ 3. But if tenant in dower be disseised, and disseisor dies seised, the heir shall have his age against the feme. 44 E. 3. 43.]

[ 4. In attaint against the heir of him who recovered in the first action the parol shall not demur for the non-age of the defendant for the mischief of the death of the petit jury before his full age. 47 Aff. 4. Curia. 47 E. 3. 9. \* H. 6. 46. Curia.]

\* Fitzh. Age, pl. 16. cites S. C.—  
—Br. Age, pl. 3. cites S. C.—

Ibid. pl. 9. cites 47 E. 3. 7. S. P. per omnes, though he be tenant and in by descent.—S. C. cited 6 Rep. 4. b.—S. P. by Haughton J. because the jurors may all die. 3 Bulst. 135. 137. and S. P. by Doderidge J. Ibid. 140. and says that in this all our books agree.—Ibid. 145. S. P. admitted by Coke Ch. J.—S. P. by Haughton J. Roll. Rep. 251. and Ibid. 323. S. P. by Haughton, and cited the books in the principal case, and the same was agreed to per curiam, and Coke Ch. J. and Crooke added this further reason, because it was pro bono publico, and to punish a false verdict.

Br. Age, pl. 9. cites S. C. that in attaint, notwithstanding the heir be tenant, and in by descent, yet he shall not have his age; per omnes.—Fitzh. Age, pl. 43. cites Sir Richard Walgrave's case, S. C. but S. P. does not appear.

If the next heir of the dead be within age, he must bring his *appeal of death* within the year and the day, according to this act; but it hath been holden in many books, that the parol should demur until his full age; and the reason yielded therefore is, that the defendant cannot wage battle, &c. But it hath been often adjudged, and approved by continual experience of latter times, that it shall proceed during his minority, and the reason of failer of battle is of no force; for that a man above 70 years of age shall have an appeal, &c. and yet the defendant shall be ousted of battle, and so if the plaintiff in an appeal be mayhemed, &c. the defendant shall be ousted of battle, and yet the appeal shall proceed. 2 Inst. 320.

[ 5. In attaint against the heir of a feoffee, the parol shall not demur for non-age of the defendant, for the mischief of the petit jury before his full age. 47 E. 3. 9. Curia. 9 H. 9. 46. Curia. [ 139 ]  
† 47 Aff. 4. Curia.]

\* Br. Age, pl. 3. cites S. C.—

Fitzh. Age, pl. 16. cites S. C.

† Br. Age, pl. 60. cites S. C. and S. P. per omnes.

[ 6. The same law in attaint against tenant in dower within age, who was the feme of the recoveror, and is endowed of his possession. 40 Aff. 20. adjudged.]

Fol. 138.

For she has not her dower by descent. Br. Age, pl. 38. cites S. C.

[ 7. In a *Quare impedit* the parol shall not demur for non-age of the patron defendant, because the *lapse* may incur during his non-age. 43 Aff. 21.]

Br. Age, pl. 40. cites S. C.—  
Fitzh. Age, pl. 75. cites S. C.—

3 Bulst. 141, 142. S. P. by Doderidge J. cites 43 Aff. pl. 22.—Ibid. 142. S. P. by Croke J. and ibid. 145. S. P. by Coke Ch. J.—Ibid. 145. per Coke Ch. J. accordingly, for there a wrong is done, and it is a personal action.



S. P. nor the age shall not be granted; for age does not lie in Quare impedit for the lapse, and also the heir is not party. Br. Age, pl. 40. cites S. C.—Fitzh. Age, pl. 75. cites S. C.—Roll Rep. 324. cites S. C.

[ 8. So if the king presents, in right of the heir in ward, to the church of which another is patron of the grant of the father of the ward with warranty of the land to which this is appendant, who left affects to the ward, and the patron sues by petition to the king to repeal his presentment, shewing the matter, the parol shall not demur for the non-age of the ward; for the mischief of the lapse, and this suit is in nature of Quare impedit. 43 Aff. 21. adjudged.]

Br. Age, pl. 1. cites S. C.—Fitzh. Age, pl. 14. cites S. C.—S. C. cited D. 104. b. pl. 13.—2 Inst. 328. S. P. and cites S. C.

[ 9. In a writ of *estrepement* against an infant, he shall not have his age, because this action is in nature of a trespass, and it is done by himself. 3 H. 6. 16.]

The parol shall not demur for the non-age neither of the plaintiff nor of the defendant; by the reporter. 3 Rep. 50. a.—2 Inst. 411. S. P.

[ 10. In *assise* the tenant shall not have his age, because it is De son tort demesne, and there should not be any delays in this writ. 38 E. 3. 27. adjudged.]

\* Fitzh. Age, pl. 169. cites S. C. accordingly by Wilby; but Fitzh. Ibid. says

[ 11. In a *cessavit* of his own *cesser*, the tenant shall have his age, being in by descent, because he cannot know what arrears to tender. \* 28 E. 3. 99. b. adjudged. Co. 9. Conny's case, 85. † 2 E. 2. Age 132. adjudged. 30 E. 1. But otherwise it is if he be in by purchase. Dubitatur 28 E. 3. 99. b. Contra 31 E. 3. Age † 55. adjudged.]

the contrary was adjudged, 31 E. 3.—Ibid. pl. 88. Mich. 14 E. 3. which seems accordingly. —2 Inst. 401. S. P. accordingly.—S. P. admitted 3 Mod. 222.

† 4 Rep. 4. b. cites S. C.

‡ This is misprinted, and should be pl. 54.

Where an infant claims by purchase, a *cessavit* shall lie against him. Co. Litt. 380. h. cites Pl. C. 355, &c. Stoel's case; and says that some have said, that if he has the tenancy by descent, and be himself *cesser*, a *cessavit* lies, and he shall not have his age, because it is of his own *cesser*, and cites 31 E. 3. Age 54. but says that other books (as some conceive them) are e contra; and cites 9 E. 3. 50. 28 E. 3. 99. 14 E. 3. Age 88. 2 E. 2. Age 132. and others, which books do not prove that the *cessavit* lies not in that case, but the contrary that he shall have his age, to the end that he may at his full age certainly know what to plead, or what arrears to tender; for the land was originally charged with the feignory and services.—6 Rep. 4. b. cites the same cases.—See (C) pl. 12.

[ 140 ] [ 12. In writ of *partition* between coparceners, the age does not lie for the defendant; for nothing is demanded but a partition. 9 \* H. 6. b. 8 H. 37 El. B. per curiam. Contra 10 H. 4. 5.]

In a writ of *partition* an infant shall

not have his age. Br. Age, pl. 53. cites 9 H. 6. 6. 8 E. 3. and Fitzh. Age 115.—Co. Litt. 171. a. b. S. P. accordingly.

\* Quære whether this should not be 9 H. 6. 6. b. which is according to Brooke, where nothing is mentioned of coparceners.

Hob. 179. pl. 214. S. C.

[ 13. The same law is of a partition between jointenants and tenants in common by the statute, H. 37 El. B. Curia. Hob. Rep. 242. between Points and Gibson.]

\* It seems this should be 9 H. 6. 6. —Br. At-  
tornment,

[ 14. In *per quæ servicia*, defendant shall not have his age, but shall be compelled to attorn; for he is not prejudiced by his attornment; for when he comes to full age he may disclaim to hold of him, or [say] that he holds by less services, notwithstanding this attornment.



attornment. 42 E. 3. Age 33. \* 9 H. 6. b. Co. 9. † Conny 85. pl. 41. S. P. cites 37 H. 8.]

† 2 Brownl. 84. S. P. per cur. and S. C. by the name of Crane v. Colepit.—Co. Litt. 315. a. (d) S. P. accordingly, whether he has the land by purchase or descent.

Resolved that in a *per quæ servicia* against an infant, who has the tenancy by descent, he shall not have his age, because *at first the lord departed with the land in consideration of the tenant's holding of him, and doing him services, and paying to him annual rent*, and the tenant is called in law Tenant Paravail, because the law presumes that he has benefit and availe over and above the services that he does, and the rent which he pays to the lord, and so it would be against reason and the intent of the creation of the tenure, that when the heir has the tenancy paravail by descent, that he shall not pay the annual rent, &c. reserved on the creating the tenancy, and that is the reason that the heir of the tenant, who has the tenancy by descent, may be distrained for the rent, &c. arrear, during his minority, and therefore shall not have his age. 9 Rep. 85. a. Mich. 9 Jac. C. B. in Conny's case.

[15. *The same law is in a quid juris clamat* against an infant. 42 E. 3. Age 33. per Belknap said to be adjudged. Contra 2 E. 2. Age 78.] Co. Litt. 315. a. S. P. accordingly.

[16. In a *per quæ servicia*, if the tenant says that the conusor is dead, his heir within age, the parol shall not demur for his non-age, though it may be that the conusor was tenant in tail; for it seems that the heir, if he was of full age, cannot come to plead it; but the tenant may plead it, if it be true. Contra 2 E. 2. adjudged, 77 Age.]

[17. In a *quid juris clamat* by him in reversion against tenant in dower, the parol shall not demur for the non-age of the demandant; for be he of full age, or within age, he ought to warrant the land to the tenant in dower, by reason of the reversion by force of an *act in law*. 13 E. 2. Age 121. adjudged.] Br. Age, pl. 75. cites S. C. that in quid juris clamat the parol shall not demur for the non-age of the plaintiff.

[18. But if an infant in reversion brings *quid juris clamat* against tenant for life, the parol ought to demur; for he has a warranty against his lessor by special deed, to do which thing the plaintiff who is within age cannot bind him. 13 E. 2. Age 121. Curia.] In quid juris clamat against tenant for life, who pleads that this was

*leased to him without impeachment of waste*, and if the plaintiff will confess this, then he will attorn; but it was said that rather than the infant shall make such confession, age shall be allowed him, and so it was; per Haughton J. 3 Bulst. 137. cites 45 E. 3. 5.—9 Rep. 85. b. S. C. cited by Coke Ch. J.—Roll Rep. 323. S. C. cited per Haughton.—Co. Litt. 320. b. S. P. accordingly.

The parol shall demur, because the plaintiff was an infant and could not *confess a deed of lease for life, without impeachment of waste* pleaded in quid juris clamat. Br. Parol Demur, pl. 6. cites 43 E. 3.

[19. In a writ of *mesne* brought by baron and feme, in right of the feme, the parol shall not demur for the non-age of the feme. 21 E. 3. Age 85. adjudged.] [141] See (E) pl. 3. S. C.

[20. In a writ of *mesne* the parol shall not demur for the non-age of the demandant, because it is brought for the tort, and damage done to the demandant himself. Temp. E. 1. Age 119. adjudged. 7 E. 3. Age 140, adjudged contra. Temp. 1 E. 1. Age 120. admitted.] Fol. 139. 6 Rep. 3. b. in Markhal's case,

cites S. C. accordingly; and tempore E. 1. Age 119. and 7 E. 2. Age 140.—S. P. accordingly, because it is not reasonable that the infant shall be distrained for the services of the mesne during his non-age, and not have any remedy till his full age; but since his non-age will not privilege him from payment of the rent during his non-age, the law will give him remedy also during his non-age. 11 Rep. 85. a. in Conny's case, obiter, cites S. C.

[21. In

[ 21. In writ of *meine brought by tenant in tail against him in reversion*, if he binds himself to the acquittal for cause of the reversion, the parol shall not demur for the non-age of the demandant. Temp. E. 1. Age 120.]

See (F) pl.  
6. S. C.

[ 22. In a *contributione facienda* by one coparcener against another, the parol shall not demur for the non-age of the tenant, though he said that his ancestor died seised, and held line contributione facienda. 4 E. 2. Age 136. adjudged.]

See (C) pl.  
11. S. C.—  
9 Rep. 85.  
a. S. C.

[ 23. In a writ of *customs and services* the parol shall demur for the non-age of the tenant being in by descent. 6 H. 3. Age 148.]

cited per cur. accordingly.

\* S. P. Br.  
Age, pl. 3.  
cites S. C.

for the title  
is bound by  
the recovery;  
but in

[ 24. If a man recovers against *A.* who dies, in *scire facias* to execute it against his heir within age, he shall not have his age. \* 47 E. 3. 8. † 9 H. 6. 46. 18 E. 3. 33. ‡ 23 E. 3. 22. 47 Aff. 4. ¶ 28 Aff. 17. per Thorpe. 15 E. 3. Age 95. adjudged 8 E. 2. Itinere Cant. Age 124.]

this case, if the demandant had entered after the recovery, and the tenant had re-entered and died, and his heir is within age, he shall have his age; for there the judgment is executed.—Fitzh. Age, pl. 43. cites S. C.—S. C. cited by Haughton J. 3 Bulst. 137.

† Br. Age, pl. 3. cites S. C.—Fitzh. Age, pl. 16. cites 9 H. 6. 47. but I do not observe the S. P. exactly.

‡ Fitzh. Age, pl. 99. cites S. C. and takes a diversity where the tenements descend to the heir from the same ancestor against whom the recovery was, and where from another ancestor, and that in the last case he had his age granted to him by award, which should not be if he claimed from the same ancestor that was party to the judgment.

¶ Fitzh. Age, pl. 267. cites S. C.—3 Bulst. 141. S. P. by Doderidge J. and cites 18 E. 3. 34. 22 E. 3. 22. 27 E. 3. 88. 47 E. 3. 13.

In a *sci. fa.* to execute a judgment the heir shall not have his age; for the law adjudges that he cannot have title, but that he is bound by the judgment; per Doderidge J. Cro. J. 393. cites 18 E. 3. 34. and 22 E. 3.

In recovery against the ancestor the parol shall not demur for the non-age of the heir; for the heir and his title are bound by the judgment. Br. Parol Demur, pl. 4. cites 34 H. 6. 3, 4.

\* Fitzh.  
Age, pl. 97.  
cites S. C.  
according-  
ly, where  
the sci. fa.  
was brought  
against a  
tenant who  
was in by

[ 25. The same law in a *scire facias* to execute a fine against the heir of the conusor, he shall have his age. \* 22 E. 3. 9. adjudged. 15 E. 3. Age 95. Dubitatur 18 E. 3. 32. b. See 44 E. 3. Age 37.]

[ 26. So it is if it be sued against the heir of a stranger to the fine. 24 E. 3. 29. adjudged. 21 E. 4. 19. b. 33 E. 3. Aid del Roy 109.]

descent.—Br. Age, pl. 46. cites S. C. that he shall have his age where he alleges a title of descent and non-age in him; quod nota.—Fitzh. Age, pl. 21. cites S. C.

[ 142 ]

For the  
title of the  
feoffor was

[ 27. If a man recovers in *præcipe quod reddat*, in *scire facias* against the heir of the alienee within age to execute the judgment, he shall not have his age. 2 H. 4. 16. b.]

bound by the judgment. Br. Age, pl. 11. cites S. C.—So where a man recovers against baron and feme, and she dies mean between judgment and execution her heir within age, he shall not have his age; for the title of his mother is bound by the judgment. Ibid.—Br. Executions, pl. 24. cites S. C.

Delays are ousted in *scire facias* by the statute, as *essoign*, *protection*, and *voucher*, but he shall have his age where he alleges title of descent and non-age in himself; per cur. Quod nota. Br. Age, pl. 46. cites 21 E. 4. 19.

[ 28. But if another than he against whom the recovery was, died seised,

*seised, and a scire facias is sued against his heir, he shall have his age.* 18 E. 3. 33.]

[29. If a man *recovers against an abbot in contra formam collationis*, in *scire facias* against the *tertenant* who prays in aid of the heir within age, the parol shall not demur. 2 H. 4. 16. b.]

Br. Execution, pl. 24 cites S. C.

—If in *scire facias*

upon *contra formam collationis* the tenant says that this land was allotted to his *feme* in partition, &c. and she *did seise* his heir within age, and prayed aid of him, and that the parol demur for his non-age, some held that the aid lies, but not the age. Br. Age, pl. 11. cites S. C.—See (K) pl. 2. S. C.

[30. In a *scire facias* against the heir of him against whom the recovery was, if the heir be in by descent of another ancestor than him against whom the recovery was, he shall have his age. \* 23 E. 3. 22. adjudged. 15 E. 3. Age 95. admitted.]

So in *scire facias* upon a recognizance against the heir who is

in by descent, he may shew how he is in by descent, and shall have his age. Br. Age, pl. 9. cites 47 E. 3. 7.

\* Fitzh. Age, pl. 99. cites S. C.

[31. So though in this case the ancestor of whom the heir claimed by descent was in by descent from him against whom the recovery was. 23 E. 3. 22. adjudged.]

Fitzh. Age, pl. 99. cites S. C.

[32. In a *scire facias* against the heir of him who accepted a special tail by the fine being dead without special issue, the heir shall have his age. 2 H. 5. 11. b. 12. admitted.]

Fitzh. Age, pl. 22. cites S. C.

[33. If a man brings writ of error against the heir of him who recovered being within age, and in by descent in the land, the parol shall not demur for his non-age, though peradventure he has a release or other matter to bar the plaintiff, the which he has not knowledge to plead within age. 47 Aff. 49. adjudged.]

But if he is *tertenant*, he shall for that reason have his age.

Br. Age,

pl. 3. cites 9 H. 6. 46.—So *ibid.* pl. 6c. cites 47 Aff. 4. if he was *tertenant* and in by descent.—6 Rep. 4. b. S. P. cites 47 E. 3. 7.

[34. [But] in writ of error against the heir of the recoveror in a real action, the parol shall demur his non-age, though he has nothing in the land, but another is tenant, because he cannot have conuſance of his right, nor of that which is best for him. 9 H. 6. 46. a. b. per all the justices. Contra 47 Aff. 4. adjudged.]

Br. Age, pl. 3. cites 47 E. 3. 7. contra, that he shall not have his age unless he

be *tertenant*, but *scire facias* shall issue against the *tertenant*, and they shall proceed to examination of error.—Writ of error was brought against tenant by the curtesy, and the heir could not have his age, for the writ was brought against him, but by reason only of the privity.—*Ibid.* pl. 9. cites S. C.—*Ibid.* pl. 6c. cites 47 Aff. 4. accordingly.

\* If the heir of the recoveror is *tertenant* he shall have his age; by all the justices; but if he brings writ of error against one, and *scire facias* against another, as tenant of all the land, the defendant shall not have his age against him against whom the writ of error was brought. But if writ of error be brought against one, and *scire facias* against another, as tenant of the moiety, yet the defendant in the writ of error shall have his age for the moiety; and after great debate, adjudged that they shall immediately go to examination of the errors against the other, &c. Fitzh. Age, pl. 16. cites 19 H. 6. [but it seems it should be 9 H. 6. a. pl. 29.]

[35. If a man in writ of error against him who was privy to the judgment reverses the judgment, and after sues a *scire facias* against the heir of the alienec of the land within age, he shall have his age. 47 Aff. 4. per Candish.]

[143]  
Fol. 140.

[36. So if a man reverses a recovery in writ of *disceit*, and after sues a *scire facias* against the heir of the alienec of the land within age, he shall have his age. Contra 47 Aff. 4. per Tank.]

An infant shall not have his age in a writ of *disceit*; per Doderidge

Doderidge J. 3 Bulst. 136. cites S. C. and 47 E. 3. 7. and says, that with this agrees 35 H. 6. 44. where the case is put of a writ of error and no age to be allowed.—3 Bulst. 141. Doderidge J. said, that error, attain, and disceit in not summoning the party as he ought to do, are all of the same nature.—Roll. Rep. 326. in pl. 31. Coke Ch. J. agreed, that age lies not in writ of disceit, and yet there is no book to prove it, but in a disceit there is a tort.—It was said, that the reason why it lies not in disceit, is, for doubt of the death of the summoners and viewers. Cro. J. 392.

[ 37. In a *scire facias* brought by an infant, the parol shall not demur for the *non-age* of the demandant. Temps E. 1. Age 119. per Berr.]

S. C. cited  
Arg. 2 Ld.  
Raym. Rep.  
1436.—  
Cro. J. 392.  
pl. 5. Her-  
bert v. Bi-  
nion, S. C.  
adjudged by  
Coke Ch. J.  
Crooke and  
Haughton.  
J. that the

[ 38. If *baron and feme* levy a fine of the land of the baron, and after the *baron* dies, and the *conusee* dies his heir within age, against whom the *feme* brings writ of error, being *tertenant*, but the *feme* pleads that she claims only dower of the land, yet the parol shall demur, because the *feme* may have other title to the land when this is reversed, and the dower is not demanded in this action as in *quod ei deforceat*. H. 13 Jac. B. R. between Harbert and Binion, dubitatur upon demurrer; but after the parties stayed till his full age, and then sued a resummons, scilicet, Mich. 10 Car.]

parol shall demur; but Doderidge strongly e contra.—3 Bulst. 134, &c. S. C. adjudged accordingly, but Doderidge e contra.—Roll Rep. 250. pl. 19. S. C. and Coke and Crooke thought the age lies, but Doderidge and Haughton e contra, & adjournatur.—Ibid. 323. &c. pl. 31. Doderidge J. held this former opinion, but Coke, Crooke, and Haughton, held that age ought to be granted.—Mo. 857. pl. 1148. Herbert v. Bingham S. C. but nothing is mentioned as to the plea of her claiming nothing but dower; but says that upon argument at bar and at bench the age was granted, because he that prayed it was *tertenant*, whereas had he not been so, he should not have had his age in error.

S. P. nor  
against the  
feme of the  
conusee.

39. *Execution upon statute merchant* shall not be against the heir during his non-age. Br. Age, pl. 33. cites New Book of Entries, fol. 118, 119.

Br. Age, pl. 49. cites 8 E. 1. and Fitzh. Affise, 417.—And quære if the same law be not of statute staple. Br. Age, pl. 33. cites new Book of Entries, fol. 118. 119.

40. If the *disseisor* leases for life, and dies, and the *lessee* is impleaded, and makes default after default, upon which the *heir* of the *disseisor* prays to be received, being within age, he shall have his age notwithstanding the said statute, which shall be taken strictly, because it controls the common law, and charges the inheritance of the subject. 2 Le. 148. pl. 183. Arg. says it was so holden 9 E. 3.

Mo. 342.  
pl. 465.  
Hill. 35  
Eliz. Wil-  
liams's case  
S. P. ad-

41. In writ of error upon a recovery against tenant in dower, the age shall not be granted. Cited by Jones J. as 41 Eliz. WILLIAMS v. WILLIAMS; quod fuit concessum per Coke, Doderidge, and Crooke.

mitted.—Cro. E. 557. pl. 14. Pasch. 39 Eliz. S. C. and S. P. by Fenner, but not being the point in question the other justices said nothing thereto.—Ibid. 567. pl. 1. S. C. adjournatur.—S. C. cited Cro. J. 392. pl. 5. as to an infant's suffering a recovery by default, that he shall not avoid it by error for this cause.

[ 144 ] 42. Where the action shall be lost for ever, the parol shall not demur; as in the case of a *Quare impedit*; per Wich. Fitzh. Age, pl. 75. cites 43 Aff. 21.

43. In *quid juris clamat* an infant cannot confess the deed, if he be tenant, by reason that he is an infant. Br. Age, pl. 57. cites 43 E. 3. 5.

44. In

44. In *quod ei deforceat* against a tenant, against whom the first recovery did not pass, he vouched one as heir, and for his non-age prayed his age, and had the voucher, but not the age. Br. Age, pl. 62. cites 44 E. 3. 43.

The parol shall not demur, because it was upon a recovery

in assise.—Br. Parol Demur, pl. 8. cites S. C.

45. In *præcipe quod reddat* against an infant, he may confess the action as to part, and pray his age for the remnant, and shall have it; per Tanke. Quod non negatur. Br. Age, pl. 9. cites 47 E. 3. 7.

46. Appeal brought by an infant within age, and because it appeared by inspection that he is within age, therefore it was awarded that the parol demur till his full age. Br. Age, pl. 16. cites \* 11 H. 4. 94. H. 32 E. 3. and Fitzh. Age 57.

S. P. Br. Age, pl. 66. cites 32 Aff. 8.—Ibid. pl. 68. cites 17 E. 4. 2.

S. P. and the defendant shall remain in prison in the mean time; by the justices.

\* Br. Parol Demur, pl. 9 & 18. cites S. C.—But ibid. pl. 1. cites 27 H. 8. 11. says that an infant may have appeal of murder of his ancestor, and it shall be by guardian; and not by attorney; and the parol shall not demur at this day, as was used in ancient time.

47. If an infant be arraigned, the justices may have discretion of him if he be of 4 years, &c. Br. Age, pl. 55. cites 35 H. 6. 11.

48. If a man recovers in writ of right in a base court, and the other brings writ of false judgment, and reverses the first judgment, there the heir of him who recovered in the base court shall not have his age in *scire facias* sued to execute the judgment in the writ of false judgment; per Chocke Arg. to which it was not answered. Br. Age, pl. 61. cites 8 E. 4. 19.

49. In a suit by petition to the king, in nature of a formedon in remainder, for lands in the hands of the king by attainder of the duke of Somerset, which right of remainder descended to him in tail from an ancestor of the petitioner then within age. Adjudged that the parol demur as well as if it had been in a formedon in remainder or reverter; but Sanders and the Ch. Baron were e contra. Dal. 22. pl. 4. Anno 3 & 4 P. & M. Bassett's case.

D. 136. pl. 17. S. C. accordingly.—S. C. cited as adjudged accordingly; quod Dyer concessit. Mo. 35. in 37. in pl. 4.

pl. 114.—S. C. cited and agreed by Dyer accordingly. Dal.

50. In all real actions at the common law, if the tenant was within age, and in by descent, he should have his age. Quod nota: 6 Rep. 4. b. and cites several actions to that purpose; and then adds, viz. So that the law favours the tenant within age, that has the possession by descent, more than the demandant who has only a right by descent; but the stat. of Westm. 1. takes away the age of the tenant in writ of entry sur disseisin en le per. 35 Eliz. C. B.

51. In *scire facias* upon a judgment in a writ of false judgment, the heir shall not have his age. Roll. Rep. 325. 326. Hill. 13 Jac. B. R. in case of Herbert v. Binion, cites 8 E. 4. 19. b.

3 Bulst. 145. cites S. C. per Coke.

Quia respondere non potest.

52. In cases of necessity, and pro bono publico, no age is to be granted; as in the case of presentment, where lapse may incur before his full age. 3 Bulst. 142. Mich. 13 Jac. by Croke J. Arg.



53. *Where an infant does a thing en autre droit, as if he be officer or executor, in such cases the benefit of his age, being only for delay, shall not be allowed him; per Croke J. 3 Bulst. 142.*

54. *If a man has 2 fines, and a writ of error is brought to reverse the first, yet the tertenant shall have his age; per Coke Ch. J. Roll. Rep. 251. Mich. 13 Jac. in pl. 19.*

55. *The heir at law shall be allowed his non-age upon a writ of error brought to reverse a common recovery suffered by his ancestors to the use of himself and his heirs, and the parol shall demur quousque, &c. for the law takes care to preserve the estates of infants who cannot take care of themselves. L. P. R. 47. cites the Ld. Jefferies and his Lady's case. 5 W. & M. B. R.*

56. *Debt is brought against B. upon a bond as heir of A.—B. pleads riens per dissent præter a reversion after the death of C. The plaintiff takes his judgment for assets quando acciderit; then B. dies, and afterwards C. dies, and the plaintiff, setting forth all this matter, brings his scire facias upon this judgment against the heir and tertenants of B. The heir appears and pleads, that he is infra ætatem, viz. of the age of 18 years, and prays that the parol may demur quousque, &c. The plaintiff demurs, and the court upon argument were of opinion, that he should not have it, because judgment was recovered against his father, and the estate was bound thereby, quando acciderit, and that this prosecution was only to have execution of that judgment. L. P. R. 47. cites Lee's case, 2 Annæ B. R.*

In this case was cited the case of HERBERT v. BROWN, [BINION] Cro. J. 392. as a case which would govern this case; but the court held, that that case came not up to this case, because that was upon a plea of non-age to the first writ of error, which was allowed, and well;

but to bring it to this case, it should have been of the same plea of non-age to a writ of error brought upon the judgment which allowed the non-age in the first writ of error. Ibid. 1436, 1437.

57. *A writ of error was brought in Ireland against an infant to reverse a common recovery, and had judgment that the parol should demur. Upon this judgment error was brought in B. R. in England, to which the infant pleaded his age. The Ch. J. and two other justices (the 4th justice being plaintiff) held that this plea could not hinder B. R. here from considering the judgment given in B. R. in Ireland; that if such judgment there was good, it will be affirmed, and the errors in the recovery cannot be looked into, and the defendant will have the same advantage as if this plea had been allowed; but if the plea was not good, it would be strange to allow it here only to make an ill plea good, and thereby let the party have the intire benefit of an erroneous judgment, and falls directly within the rule of Non debet adduci exceptio ejusdem rei, cujus petitur dissolutio; if the defendant had joined in the assignment of errors, it would not have waived the benefit of his non-age, because that is adjudged to him by B. R. in Ireland; and judgment that defendant answer to the errors assigned. 2 Ld. Raym. Rep. 1433. Mich. 13 Geo. 1. Fortescue Aland v. Mason.*



(C) In what Actions upon Plea pleaded the Parol shall demur.

[1. **I**n replevin against an infant, if he avows upon the plaintiff, and plaintiff shews forth the release of the father of the infant to hold by lesser services, yet the parol shall not demur. 48 E. 3. 33. b.]

[2. In trespass vi & armis against an infant who justifies for a rent, or such like, as heir to his father, if the other shews forth a deed of the ancestor in discharge, yet the parol shall not demur, but he ought to answer to the deed immediately. 48 E. 3. 34.]

[3. In assise by infant, the parol shall not demur for the warranty pleaded of his ancestor, because all shall be inquired by the assise. 48 E. 3. 33. b.]

brought by him the parol shall not demur upon any plea pleaded, because there is a jury the first day, and the jury shall inquire of the circumstances. 6 Rep. 4. b. cites 8 E. 3. 36. — See (D) pl. 10.

[4. In writ of debt against an heir he shall have his age, because he may at full age discharge himself by saying that he had nothing by descent. \* 18 E. 3. 33. † 11 H. 6. 10. b. 411. 3 E. 3. Age 51. adjudged. 19 E. 2. Age 122. admitted by issue. 8 E. 2. Itinere Cant. ‡ 125. adjudged. H. 7 Jac. B. between Vivian and Tre-lawnye, per Coke.]

S. C. but I do not observe S. P. — Fitzh. Age, pl. 17. cites S. C. but seems not to be S. P. But see (K) pl. 7. S. C.

‡ Fitzh. Age, pl. 125. cites It. Cant. Mich. 20 E. 2. — S. P. admitted in the case of Hawtree v. Auger. See (N) S. C.

2 Inst. 89. cites 11 H. 7. 22. That if a man by obligation binds himself and his heirs to pay him 100 l. at such a feast, and if he pay it not at that feast, that then he and his heirs shall pay 10 l. for every quarter it shall be behind, the obligee dies, and leaves assets in fee simple his heir within age, he shall have his age, and shall not pay this 10 l. incurred during his minority after his full age.

[5. So in a writ of annuity against an heir he shall have his age, because he may discharge himself by saying he had nothing by descent. Contra \* 11 H. 6. 10. b.]

Fitzh. Age, pl. 17. cites S. C. — See (K) pl. 7. S. C.

[6. So if a man sues execution upon a statute merchant against an heir within age, and ousts him by it, an assise lies for the heir, for he shall have his age. 23 E. 3. 21. b. Curia. 18 E. 3. 33. 47 Aff. 4.]

In such case the heir shall have his age. Co. Litt. 290. a. — Br.

Age, pl. 33. S. P. cites New Book of Entries, 118, 119. — Ibid. pl. 49. cites 8 E. 1. and Fitzh. tit. Assise 417. — An Audita Querela lies, because there is an exception in the writ of extent, that if land be descended to an infant, the sheriff shall surcease to extend; and though the writ issued against the party himself who made the conveyance, yet when it appears by the return of the sheriff that he is dead, the infant shall be aided by Aud. Quer. or otherwise the extent shall be void which is made upon the possession of the infant; per Hutton J. Mich. 3 Car. C. B. Doyly's case.

[7. So if a man sues execution upon a recognizance against an heir within age, he shall have his age though he be charged partly as tertenant. Co. 3. Sir William Harbert, 13. 29 E. 3. 39. \* 29

\* Br. Age, pl. 36. cites S. C. — Fitzh. Age, Aff.

pl. 73. cites Aff. 37. adjudged. 11 E. 3. Age 4. adjudged. 12 E. 3. Execu-  
 S. C.— tion 77. 15 E. 3. Age 95. per Thorpe, said to be adjudged 1 E.  
 2 Inst. 89.  
 S. P. and so 3. 3. per Herle, but quære.]

though the recognizance be upon the statute of 23 H. 8. for it is excepted in the process against  
 the heir. — See (N) pl. 7.

If A. acknowledges a recognizance to B. of 20 l. to be paid at a certain feast, and A. doth grant,  
 that if the 20 l. be not paid at the day, then he shall pay 10 s. a week for every week it shall be  
 behind, and before the feast A. dieth, seised of fee-simple lands, his heir within age. In a *scire*  
*facias* upon the recognizance, the heir shall have his age, by the common law; and after his full age,  
 he shall be freed of the 10 s. a week by this statute. 2 Inst. 89. in the notes on the statute of  
 Merton 20 H. 3. cap. 5. — Cay's Abridgment of the statute, tit. Infant, Parag. 1. adds a quære  
 if this statute be repealed by 37 H. 8. cap. 9.

S. P. Co. [ 8. So if a man *recovers* in action of *debt* against the father, who  
 Litt. 290. a. dies, in a *scire facias* against the heir upon this judgment he shall  
 [ 147 ] have his age. H. 7. Jac. B. between Vivian and Trelawnye, per  
 curiam. But the clerk said, that the precedents are contra. Con-  
 tra H. 7 Jac. B. per Coke.]

S. P. not- [ 9. In a *scire facias* against a *tertenant* to have execution of da-  
 withstand- mages recovered against J. S. if the *tertenant* be within age, and in  
 ing that by descent, he shall have his age. 24 E. 3. 28. adjudged.]

elsoigns,  
 voucher, &c. are ousted in *scire facias*. Br. Age, pl. 25. cites 24 E. 3. 29. S. C. — Fitzh.  
 Age, pl. 102. cites S. C. — Co. Litt. 290. a. S. P. — See (N) pl. 12.

[ 10. Infant who has the tenancy by descent shall not have his  
 Fol. 141. age in a *per quæ servitia* brought against him. Co. 9. Conny 85.  
 resolved.]

See (B) pl.  
 14. S. C. and the notes there.

See (B) pl. [ 11. In writ of *customs and services*, which is a writ of right  
 23. S. C. in its nature, and in which judgment final shall be given, an in-  
 fant in by descent shall have his age. 6 H. 3. Age 148. Co. 9.  
 Conny 85.]

See (B) pl. [ 12. In *cessavit* against an infant for his own *cesser*, he shall  
 11. and the have his age, because he knows not what arrears to tender be-  
 notes there. fore judgment, and this is a writ of right in its nature. Co. 9.  
 Conny 85.]

13. In *false judgment* it was alleged that the tenant had shewed a  
*dying seised*, and descent to him from his father, and that he being  
 within age prayed the parol might demur in the plea, which was  
 in the nature of a writ of *ayel*; but it was denied, and for this the  
 judgment was reversed; for though the record supposed the custom  
 of the court to be, that an infant impleaded there, of the age of 16,  
 should be driven to answer, without any stay of the plea, and that at  
 that age he might alien his lands, yet since the defendant had not  
 maintained this custom in C. B. which should be issuable and triable  
 by the country, the court of C. B. would not regard this custom,  
 which is erroneous at the common law, yet he shall not thereby  
 be drawn to answer to a *præcipe quod reddat* at such age. D. 262.  
 b. pl. 32, 33. Trin. 9 Eliz. Anon.

## (D) Upon what Plea the Parol shall demur.

[1. **I**N a formedon in descender, if the tenant pleads the feoffment of the ancestor of the demandant with warranty and assets, and the demandant denies the deed, the parol shall demur for the non-age of the demandant. Dubitatur 2 E. 3. 59. b.]

So if the demandant pleads nothing by descent, and the tenant

says that the demandant is within age, and prays that the parol demur, and the averment not received. Br. Parol Demur, pl. 5. cites 42 E. 3. 13. — See (A) pl. 1. and the notes there.

[2. [So] in a formedon in descender brought by an infant, if the tenant pleads the feoffment with warranty and assets of the ancestor of the plaintiff, the parol shall demur. 38 E. 3. 24. b. 43 Aff. 21. 27 Aff. 74. 11 E. 3. Age 6. 16 E. 3. Age 45. adjudged. Contra 33 E. 3. Age 153. till the deed be denied. 2 E. 3. 59. b.]

And if there are 2 demandants, the one within age, and the warranty of the ancestor with

assets be pleaded, the parol shall demur for the non-age of the one, quod nota; per Littleton, quia non negatur. Br. Parol Demur, pl. 4. cites 34 H. 6. 3.

[3. The same law if a collateral warranty be pleaded in bar of this action. 12 E. 4. \* 12. b.]

Fitzh. Age,

pl. 18. cites Mich. 12 E. 4. 17. where it was held by Littleton, that if lineal warranty with assets be pleaded in bar, the parol shall demur; but otherwise if collateral warranty be pleaded; for that is such matter to which he ought to answer; but others said that the parol should demur in both cases, &c.

• See pl. 9. in the notes.

[4. In quare impedit, if the feoffment of the acre to which the advowson is appendant, with warranty of the ancestor of the defendant, be pleaded with assets of the same ancestor, though the defendant be within age, yet the parol shall not demur for the mischief of the incurring of the lapse in the mean time. 43 Aff. 21. adjudged.]

See (B) pl. 7. and the references there.

[5. In a formedon in descender, if the tenant pleads the feoffment of the ancestor of the demandant to him, and J. S. with warranty and assets, the parol shall demur for the non-age of the demandant, without shewing that he had the estate of J. S. by which he alone may deraign the warranty; for if the demandant be of full age, and should plead this plea, it would be an acknowledgment of the deed for a moiety. 13 E. 3. Age 96. adjudged.]

[6. [So] in a formedon in descender, if the tenant says that the ancestor of the demandant did not die seised, the parol shall demur for the non-age of the demandant; for if he did not die seised, he has not this writ in lieu of a mortdancestor. 3 E. 2. Age 133.]

[7. In a writ of warranty of charters, upon a warranty made to the ancestor of the demandant, if the defendant denies the charter, the parol shall demur for the non-age of the plaintiff. Temp. E. 1. Age 129. per Inge.]

See (A) pl. 5.

[8. In an action of the possession of the infant himself, the parol shall not demur upon any plea pleaded. Co. 6. Markall 3. b.]

[9. As in writ of entry of a disseisin done to himself, brought by an infant, if the tenant pleads the feoffment of the father of the demandant

Fitzh. Age, pl. 18. cites 12 E. 4. 12.

with

—S. P. *with warranty to him*, yet the parol shall not demur, because it per Brian & Littleton J. is brought of his own possession. 12 E. 4. 12. Co. 6. Mark- all 3. b.] and is not

brought as heir. But the stat. of Gloucester says that in writ of coſnage, ayel, and beſail, the plea ſhall proceed; for theſe are anceſtreſſes; but where he claims of his own poſſeſſion, it ſhall not demur, but ſhall proceed by the common law. Br. Age, pl. 42. cites 12 E. 4. 17. —6 Rep. 3. b. in Markhal's caſe, cites 12 E. 4. 17. S. P. —And it ſeems that (12) in Roll is miſprinted for (17.)

See (C) pl. [ 10. [So] In an *affiſe* the parol ſhall not demur for the *non-age* 3. S. C. and *of the demandant*, though the *deed of his anceſtor* be *pleaded in bar*, be- the notes *cause it is brought of his own poſſeſſion*, and the *circumſtances ſhould* there. — *be inquired in it.* 12 E. 4. 12.]

See (B) pl. 10. and the note there. —Fitzh. Age, pl. 18. cites Mich. 12 E. 4. 17. [And the laſt (12) here ſeems miſprinted.]

Fitzh. Age, [ 11. So the parol ſhall not demur in this writ for the non-age pl. 18. cites *of the demandant, if a fine be pleaded in bar*, ſo that the circum- 12 E. 4. 17. *ſtances ſhould not be inquired.* 12 E. 4. 12.] and ſo it ſeems it ſhould be here.

[ 12. So if a *foreign release* be pleaded *with warranty*, in which the circumſtances ſhould not be inquired. 12 E. 4. 12.]

[ 13. In an *action real*, if the *tenant pleads in bar the feoffment of the anceſtor of the demandant with warranty to J. S. and his aſſigns, whoſe aſſignee he is, and ſays that aſſets deſcended to the plaintiff*, to which the *demandant ſaid that nothing deſcended*, in this caſe the [ 149 ] parol ſhall demur, for though the feoffment and the warranty is not in queſtion, but only the aſſets, the which the infant may well try; yet if he takes this iſſue, the deed of the anceſtor ſhall be held to be *confeſſed by him.* 29 E. 3. 12. b. adjudged. 11 E. 3. Age 6. 16 E. 3. Age 45. adjudged. 33 E. 3. Age 153. Contra 23 E. 3. 22. b. adjudged.]

[ 14. So, for the ſame reaſon, if in a *formedon in deſcender* the *tenant pleads a feoffment by the anceſtor of the demandant to A. and B. the father and mother of the tenant, and to the heirs of the father with warranty, and that they are dead, and avers that aſſets are deſcended to the demandant within age, though the demandant ſaid that B. the mother of the tenant is yet alive, and ſo the tenant has not this warranty.* 11 E. 3. Age 6. adjudged.]

[ 15. In *affiſe* againſt an infant, if the *iſſue be whether the tenant be a baſtard or a mulier, which is to be tried by the biſhop, by which his blood is to be bound perpetually, yet the parol ſhall not demur, becauſe this is of his tort, and there ſhall not be any delay in this writ.* 38 E. 3. 27. adjudged.]

[ 16. But *otherwiſe* it is in a *formedon in deſcender*; for there, if the iſſue be *whether the tenant be a baſtard*, the parol ſhall demur. 13 E. 3. Age 7.]

[ 17. But *otherwiſe* it is if the iſſue be *whether the demandant be a baſtard.* 13 E. 3. Age 7.]

18. In *nuper obiit*, where land was deſcended to 2 ſiſters, and the one releaſed to the other and died, and the heir of her who releaſed brought *nuper obiit* againſt the other, the plaintiff being within age, and

and the tenant pleaded the release, and the demandant denied it, therefore the tenant prayed that the parol demur for the non-age of the plaintiff, and so it did; quod nota. Br. Age, pl. 76. cites 6 E. 2.

19. In quid juris clamat brought by an infant, defendant said that he held for life of the lease of the ancestor of the infant, without impeachment of waste, and saving to him the advantage of the deed, he is ready to attorn; and because the infant cannot take consueance of the deed, therefore it was awarded that he attend till his full age. Br. Quid Juris clamat, pl. 2. cites 43 E. 3. 5.

20. In scire facias by an infant, a deed inrolled of his ancestor was pleaded in bar, with warranty and assets descended, and he prayed that the parol demur, and so it did, and yet he shall not avoid it by non-age, duress, &c. quod nota, by Belknap J. in the end of the case. Br. Age, pl. 63. cites 48 E. 3. 33. Br. Confession, pl. 8. cites S. C. The infant pleaded rians p. r. descent, and the plea was not taken, but the parol demurred.

21. If a deed with warranty and assets \* be pleaded in formedon, or præcipe quod reddat, the parol shall demur. Br. Confession, pl. 8. cites 48 E. 3. 33. \* But if such deed be pleaded against him

in assise, the circumstances shall be inquired. Br. Coverture, pl. 66. cites F. N. B. Fitzh. Dury fuit infra ætatem.

22. Tenant in tail aliened by fine, and after he leased to the issue in tail within age for term of his life, and died, the alienee brought scire facias to execute the fine, the heir in tail shewed this matter, and prayed his age, and had it; for it was adjudged a remitter by the non-age. Br. Remitter, pl. 38. cites 22 E. 4. 7.

## (E) For Non-age of what Person the Parol shall [ 150 ] demur.

[ 1. **T**HE parol shall not demur for non-age of the king, because the law adjudges him of full age. D. 3. 4. M. 137. 24. One vouches the king within age, and prayed Contra 2 H. 3. Age 149. admitted.]

that the parol demur, and shewed that the king's progenitor gave the land to him, but because he did not shew charter of the king, he was ousted of the warranty; nor would he shew other thing by which the king ought to warrant, &c. Fitzh. Age, pl. 149. cites Mich. 2 H. 3.

In writ of right brought by the king of the scisin of his ancestor, the defendant pleaded that the king was within age, and demanded judgment, if during his non-age, &c. But per Shard, the king is always either within age or of full age to his advantage; and the defendant was awarded to answer; and thereupon the defendant demanded the view, and had it. Fitzh. Droit, pl. 24. cites Mich. 6 E. 3.

In scire facias, the gift of the king shall not be defeated by his non-age. Per Thorpe J. to which several of the peers and sages of the realm agreed. Br. Age, pl. 34. cites 26 Aff. 54. and 6 E. 3. Fitzh. Age 89. accordingly.

Note that of land of the duchy of Lancaster, and other lands which the king has as duke, &c. the age is material, as in the case of a common person; for he has them as duke, and not as king; but by the statute of 1 E. 4. which is a private act not printed, it is annexed to the crown, but by another private act in the time of H. 7. it is disannexed, and made as in time of H. 4. Br. Age, pl. 52. cites 1 E. 6. — Ibid. pl. 78. cites S. C.

[ 2. In an action brought by baron and feme for the inheritance of See (I) pl. 4. the

*the feme, the parol shall not demur for the non-age of the baron, because in right of the feme. D. 3, 4. M. 137. 24.]*

See (B) pl.  
19. S. C.

[ 3. In writ of *mesne* brought by baron and feme, in right of the feme, the parol shall not demur for the non-age of the feme. 21 E. 3. Age 85. adjudged.]

Br. Cover-  
ture, pl. 63.  
cites S. C.

[ 4. In *detinue* against an executor upon a bailment to the testator, the parol shall not demur for the non-age of the executor, 11 H. 6. 40. b.]

[ 5. In an action of *debt* brought against baron and feme, upon the obligation of the ancestor of the feme, the parol shall demur for the non-age of the feme. 8 E. 2. *Itinere Cant.* Age 125. adjudged.]

Fitzh. Age,  
pl. 13. cites  
Mich. 18 E.  
3. 32. but  
I do not  
observe this  
very point there.—See (I) pl. 4.

[ 6. In a *præcipe quod reddat* against baron and feme of the land which the feme has by descent, the parol shall demur for the non-age of the feme, though the baron be of full age. 18 E. 3. 33. *Contra* 24 E. 3. Age 134. per Shard.]

Fitzh. Age,  
pl. 13. cites  
Mich. 18  
E. 3. 32. S. P. per Thorpe.

[ 7. A feme received for default of the baron shall have his age, though the baron was of full age. 18 E. 3. 33.]

But where  
a feme of  
full age en-  
tered into an  
obligation,  
and takes a  
husband

8. In *debt* against baron and feme on a bond by the ancestor of the feme, whereby he bound himself and his heirs. They pleaded, that the feme was within age of 21, and prayed that the parol demur during her non-age, and it was awarded accordingly. Fitzh. Age, pl. 125. cites 8 E. 2.

within age, and in debt brought upon the bond they pray his age, the court denied it. *Noy* 69. *Deeles v. Nokes*, and cites S. C.

[ 151 ]

9. If the youngest son enters, and is impleaded within age, the parol shall not demur for his age; for he cannot be heir by continuance of possession; contra of a bastard; for he may be heir by continuance of possession; per Thorp J. Br. Age, pl. 65. cites 21 E. 3. 49.

S. P. per  
Thorp J. Br.  
Discent, pl.  
30. cites 21 E. 3. 46.

• S. P. And  
so of a dean,  
master of an  
hospital, &c.  
Br. Age, pl.  
64. cites 20  
E. 4. 8.—  
Ibid. pl. 80.  
S. P. of  
things

10. In debt it was agreed, that of corporations it is no plea that the mayor is within age, the same law of an abbot, king, and bishop, as it is said elsewhere, for they are corporations, &c. Per Briggs, an infant who is made executor may make a release of debt, &c. as well as he may bring action as executor; for if he may be executor by the law, then it is reason that he may make a discharge as executor, Br. Age, pl. 45. cites 21 E. 4. 13, 14.

touching their benefice or corporations, cites 4 M. 1.

11. Note, it was in a manner agreed by all the justices in C. B. in the time of Queen Mary, that if a parson, prebendary, &c. be within age of 21 years, and makes a lease of his benefice within age, yet it shall bind him; For where he is admitted by the law of Holy Church to take it within age, the common law makes him able to demise his benefice within age. Br. Age, pl. 80, cites 4 M. 1.



(F) For the Non-age of what Person *for a Col-* Fol. 143.  
*lateral Respect* the Parol shall demur.

[1. **I**N a writ of right where battel shall be joined in grand assise, if the tenant shews any matter to have his age, which makes him heir to the same person of whose seisin the demandant has brought his action, because he claimed to be heir to the same person, he shall not have his age. 32 E. 3. Age 81. per Thorpe.]

[2. So in a formedon in reverter, if the demandant makes himself heir to the donor as heir at common law, and the tenant claims as youngest son as heir to the donor by custom, and prays the parol to demur for his non-age, yet it shall not demur, because both claims to be heir to one and the same person. 32 E. 3. Age 81. adjudged.]

[3. In a nuper obiit by the aunt against the niece, and \* demanded of the seisin of the father of the aunt, who was grandfather to the tenant, the tenant who is in by descent from her mother shall not have her age, because they are one heir, and of equal condition as to privity of blood. 9 E. 2. Age 142. adjudged. 13 E. 2. Age 146. per Berr. where the common ancestor died last seised, as this case before is to be intended, as it seems.]

\* In Roll it is misprinted (del feme) but in Fitzh. it is (demand- ed.)—  
*Nuper obiit by A. against B. of the jui-*

*son of their grandfather, the tenant said that his father was seised, and died seised, and he is in as heir, and prayed his age, and was ousted, because they claimed all by one and the same ancestor. Br. Age, pl. 77. cites 3 E. 3. It. Canc.—S. P. for this writ is brought principally to try the privity of the blood. 6 Rep. 4. b. in a nota by the reporter, as it seems.*

[4. But if land descend to A. B. coparceners, and they enter, have issue, and die seised, in a nuper obiit by one of them against the other within age, the parol shall demur for the non-age of the tenant, because their common ancestor did not die last seised. 13 E. 2. Age 146. adjudged. Contra 4 E. 2. Age 137. adjudged.]

[5. In a *rationabile parte* brought by one coparcener against another within age, where they are of divers venters, the parol shall not demur for the non-age of the tenant. 13 E. 1. Itinere North. 155. adjudged.]

[6. In a writ of *contributione facienda* by one coparcener against another, the parol shall not demur for the non-age of the tenant, though he says that his ancestor died seised, and held without contribution to be made. 4 E. 2. Age 136. adjudged.]

[ 152 ]

(G) Who shall have it *in respect of Estate.*

[1. **I**F an infant be in by purchase he shall not have his age. If a man gives in tail to his son, and dies, and the son is imphaded, he shall not have his age, for he has the possession by purchase. Br. Age, pl. 59. cites 40 E. 3. 13. 47 E. 3. 8. b. 47 Aff. 4. 21 E. 4. 19. b. 41 E. 3. Age 39. 15 E. 3. Age 53.]

But if he vouches himself to save the tail, he shall have his age, per Belknap J. Quere. Ibid.—  
 6 E. 568, pl. 1. S. P. by Clench.—S. P. Arg. Cart. 88.—See pl. 12.—See (K) pl. 3:

[ 2. [As]

S. P. per  
Cur. Br.  
Age, pl. 12.  
cites S. C.  
& S. P. The  
name (heir)  
makes him a purchaser, per cur.

[2. *As*] if a lease for life be, remainder to the right heirs of J. S. who is dead at the time, his heir within age, he shall not have his age when he comes in by aid prayer, for he has it by purchase. 7 H. 4. 5.]

\* In præcipe  
quod reddat  
the tenant  
pleaded that  
his father  
died seized of

[3. If the infant has an estate in possession sufficient to answer the action, yet if he has the residue of the estate by descent he shall not have his age. 43 E. 3. 36. \* 30 E. 3. 17. 11 E. 2. Age 144. admitted.]

the same tenements, and he is in as heir by descent, and prayed his age. The plaintiff replied, That his father did not die seized; Prist. But Wilby said, that though his father did not die seized, yet if the tenant was in as heir, he shall have his age. It was then urged, that the father in his life-time infeoffed him, and he continued that estate; Prist. But Wilby said, that if he is his heir, he may, after his father's death, elect the one estate or the other, though he infeoffed him in fee in his life-time, and therefore the plaintiff shall not have the averment, and he had his age by award. Fitzh. Age, pl. 59. cites Mich. 30 E. 3. 17. and says, that 5 E. 3. it was adjudged accordingly.

\* Fitzherb.  
Age, pl. 59.  
cites S. C.  
which see  
at pl. 3. in  
the note,

[4. *As* if father, and son and heir purchase to them and the heirs of the father, and after the father dies, and a real action is brought against the son, he shall [not] have his age though he hath the remainder in fee by descent. 43 E. 3. 36. \* 30 E. 3. 17. adjudged. 39 E. 3. Age 26.]

\* In dower,  
if the tenant  
in dower  
leases his  
estate to the

[5. If lessee for life surrenders to an infant, who has the reversion by descent, he shall not have his age. Contra \* 45 E. 3. 13. † 1 H. 6. 2. b. 22 E. 4. 7. b. 11 E. 2. Age 144. adjudged.]

heir, rendering rent for his life, the heir shall have his age in the life of the tenant in dower; for it is a surrender, and the heir is in by the ancestor. Br. Age, pl. 8. cites 45 E. 3. 13.

S. P. because he has the possession by surrender, which is a purchase. Br. Age, pl. 59. cites 40 E. 3. 13.

Br. Age, pl. 8. cites S. C. and was of a lease by tenant in dower to the heir, rendering rent for term of her life. And Finch held that the heir should have his age in the life of tenant in dower; because this is a surrender, and the heir is in by the ancestor.

† Br. Age, pl. 30. cites 1 H. 6. 1. which is, assise against tenant by the curtesy and the heir in reversion, and the tenant by the curtesy surrendered pending the writ, and died pending the writ; Per Rolf, the heir is in by descent, which Paston agreed, and that if he be impleaded he shall have his age, &c. as if the land had descended to him; quod non negatur; but yet the writ awarded good, because he came first to the possession by his own act, which makes the writ good that it shall not be avoided by the death of the tenant by the curtesy after.—Br. Discont, pl. 17. cites S. C. and S. P. by Paston.

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Fitzh. Age,  
pl. 22. cites  
S. C.

[6. If an infant be in by abatement and not by descent, he shall not have his age. 2 H. 5. 11. b. 12. adjudged. 32 E. 3. Age 81. adjudged.]

Fol. 144.

\* Fitzh.  
Age, pl. 59.  
cites S. C.

[7. If the father infeoffs his son and heir in fee with warranty, and dies, the son shall have his age, because the warranty is extinct, and therefore in lieu of it he shall be adjudged in by descent. \* 30 E. 3. 17. b. adjudged. † 24 E. 3. 36. b.]

—Br. Age, pl. 26. cites 24 E. 3. 77. contra; for the fee descended determines the franktenement. —But if a man leases to his son within age for life, and after dies, and the reversion descends to the son, he shall have his age. Ibid.—S. P. ibid. pl. 59.—But ibid. pl. 27. cites 9 E. 4. 18. contra to this that he shall not have his age; for he has his possession by purchase.

† Fitzh. Age, pl. 105. cites S. C.

[8. So if he be infeoffed by his father without warranty; for he may

may elect to be in of the one estate or the other. 5 E. 3. Age 61. adjudged.]

[9. If the heir of a disseisee enters he shall have his age. 9 H. 4. 5. Fitzh. Age, pl. 22. cites S. C. — \* 2 H. 5. 11. b.]

S. P. by the best opinion; for the statute does not oust the ages but of the heirs of the disseisee and disseisor, and not for the age of the heir of the feoffee of the disseisor, which see and quære. Br. Age, pl. 69. cites 21 E. 4. 15. and 50.

\* If the father tenant in tail is disseised, and the issue enters within age, he shall have his age. Fitzh. Age, pl. 21. cites Trin. 2 H. 5. 11.

[10. If tenant in tail enfeoff his issue, and dies, the issue shall have his age, for he is \* remitted, and so in. by descent. 11 E. 3. Age 5. † 21 E. 4. 19. b. Temps E. 1. Remitter 13. adjudged. So if he takes the estate of the discontinuee.]

\* S. P. Br. Age, pl. 56. cites 44 E. 3. 43. and Fitzh. Age, 31. —

† Fitzh. Age, pl. 21. cites S. C. accordingly, though it was objected that the issue was in by purchase. — S. P. Br. Age, pl. 48. cites 22 E. 4. 7. by judgment. But per Catesby, where the issue in tail recovers by formedon upon a dying seised of his ancestor, he shall have his age, and e contra upon a recovery in formedon upon a discontinuance, or by cui in vita. But per Brian, he shall have his age in the one case and the other; for he shall recover as heir.

[11. If an infant be enabled by custom to have and to alien his land at a certain time, as at 15 years of age, or when he can measure a yard of cloth; after this time and before his full age of 21, he shall have his age; for the custom does not extend to this collateral thing. 11 H. 4. 36. 39 E. 3. 19. b. 31 E. 3. Age 54. adjudged.]

And age shall be adjudged according to the common law. Br. Age, pl. 14. —

cites 11 H. 4. 29. — Fitzh. Age, pl. 24. cites S. C. and says the same was adjudged accordingly. 9 & 39 E. 3. — Br. Age, pl. 28. cites 39 E. 3. 10. S. P. accordingly.

[12. If a devise be to the heir in tail, and if he dies, &c. that another shall sell it, the devisee shall not have his age; for he is in by purchase of the tail. Quære \* 3 H. 6. 46.]

\* So where the remainder in fee was devised to the heir.

over to another. Br. Age, pl. 2. cites S. C. but contra if the devise had been in fee — Fitzh. Age, pl. 15. cites S. C.

[13. If a gift be to the father for life, the remainder in tail to the son, the remainder to the right heirs of the father, and after the father dies, and the fee descends upon the son within age, yet he shall not have his age, because he has the estate tail by purchase. 24 E. 3. 36. adjudged.]

Fitzh. Age, pl. 105. cites S. C.

[14. So if a gift be to the father for life, the remainder to a stranger in tail, the remainder to the son in tail, the remainder to the right heirs of the father, and after the stranger dies without issue, and after the father dies, and the fee descends upon the son within age, yet he shall not have his age, because he has the tail by purchase. 24 E. 3. 36. adjudged.]

[154] Fitzh. Age, pl. 105. cites S. C.

15. Land was given to the baron and feme in tail, the remainder to the right heirs of the baron, and after the baron and feme die without issue, and E. as cousin and heir of the baron, brought formedon in remainder, and the tenant said that the demandant is within age, and yet the parol shall not demur, for the demandant is purchaser by reason that the fee-simple was not vested till now. Br. Age, pl. 74. cites 3 E. 3. It. Not.

Fitzh. Age, pl. 105. cites S. C.

16. Precipe quod reddat, the tenant said that A. was seised and leased to him for life, remainder to B. in tail, remainder over to C.

*in tail*, and prayed aid of B. and C. in the second tail, and of the same C. because the reversion in fee is descended to him within age, and prayed that the parol demur; and it was held that the parol should demur; for though the *possession be by purchase*, yet the *fee is by descent*. Br. Parol Demur, pl. 17. cites 40 E. 3. 13.

17. A man *leased for life*, the remainder over in fee, and he in remainder has issue and dies, and after the tenant for life dies, the issue shall have his age; for the remainder is descended to him, and yet the possession did not vest till now, and he shall be in ward. Br. Age, pl. 54. cites 33 H. 6. 5.

18. Entry *sur disseisin by an infant of his own seisin*, the tenant pleaded a feoffment of N. O. the ancestor of the infant plaintiff, whose heir he is with warranty, and prayed that the parol demur for the non-age of the plaintiff. And per Littleton, the parol shall not demur; for *the action is of the proper seisin of the demandant*, and not as heir; and this is at common law, and not within this statute nor the statute of Westminster 1. Quære. Br. Age, pl. 67. cites 12 E. 4. 17.

Br. Age, pl. 47. cites S. C. per Choke and others in C. B. And by him if he appears by guardian, and imparles till another term, he shall have his age; and therefore it seems if he had appeared by attorney and imparled, that he shall not have his age; for then it shall be estoppel as it seems.—Br. Remitter, pl. 37. cites S. C. and S. P. per Choke.

19. If the disseisor enfeoffs the heir of the disseisee, and the disseisee dies, his heir within age, he shall have his age; for he is remitted. Br. Remitter, pl. 48. cites 21 E. 4. 78.

## (H) For what Thing.

\* Brooke says it seems he shall; but quære, and

if this heir who recovered in value shall have his age when he is impleaded of this land; and see 10 E. 3. 57. tit. Aid in Fitzh. 146. that the aid lies in this case; and note, that in the case of the escheat the age lies. Br. Age, pl. 51. cites S. C.

[ 1. ] IF the tenancy escheats to an infant, who is in by descent in the seignior, he shall have his age of it, 6 H. 4. pl. 1. \* 16 E. 3. Age 46. per curiam.]

2. If a man recovers rent and arrears by assise, or if he recovers annuity and arrears of it in writ of annuity, and the defendant dies, and the plaintiff brings scire facias against the heir, he shall not have his age of the arrears; for they are real, and parcel of the rent or annuity, and debt does not lie of it; but if the judgment be of the arrears and damages, then debt lies against the heir of the arrears and damages, and there he shall have his age, and this seems to be in default of the executor. Contra in scire facias against the heir. Br. Age, pl. 50. cites 23 H. 8. and 9 E. 3. Fitzh. Age 90.

[ 155 ]

3. A. recovered in a dum suit infra ætatem against 3, by default after default. Two of the tenants were within age, and on a writ of error the non-age was assigned for error, without alleging the dying seised of their ancestor, and descent to them. Sed non allocatur. D. 104. pl. 10. Mich. 1 & 2 P. & M. Anderson & al' v. Ward.

Bendl. 232. pl. 265. Waller v.

4. W. Tenant in tail, in consideration of a marriage with M. in feoffed J. S. and J. N. to the use of himself and M. for their lives, and

after of *W.* and his heirs, and died. *M.* by fine granted the lands to *T. L.* and his heirs during the life of *M.* He entered, and died seised, and his son and heir entered, against whom the son and heir of *W.* brought a formedon. *M.* was still living. The tenant pleaded non-age, and prayed that the parol might demur; sed non allocatur, because he was but as an *occupant* during the life of *M.* 4 Le. 169. pl. 275. Hill. 16 Eliz. C. B. Waller's case. Lamb, S. C. adjudged.—And. 21. pl. 43. S. C. adjudged, because he had not the land by descent, but as an occupant, which is his own act to enter into the land, and not cast upon him by the act of God.—S. C. cited Arg. Cart. 88.

## (1) Parol Demur. Vouchee.

[1. IF 2 coparceners in gavelkind are vouched as one heir, the parol shall demur for the non-age of the youngest, if he be seised, yet he is vouched but for his possession. 43 E. 3. 19.] Br. Voucher, pl. 23. cites S. C. — Contra if cause is not

found, whereupon it was shewn that the ancestor died seised of Gavelkind, which descended to them, and they entered as heir, &c. and the demandant replied that the youngest is not seised of any land descended from the same ancestor. Br. Parol Demur, pl. 7. cites S. C. — Fitzh. Age, pl. 36. cites S. C. and that the court received the averment of the demandant, and awarded the vouchee to answer.

[2. If one coparcener be vouched, and has aid of the other coparcener, who is within age, the parol ought to demur. 43 E. 3. 23. b.] Br. Aid, pl. 27. cites S. C. — Fitzh.

Counterplea del Ayde, pl. 20. cites S. C.

[3. If an infant be vouched, and bound to warranty by the deed of his ancestor, the parol shall demur for the non-age of the infant. 17 E. 3. 59.] Fitzh. Age, pl. 49. cites S. C. in a

and because the vouchee is yet within age, and is not heir of the baron, and so not within the statute, &c. the parol shall demur. cui in vita,

A man shall have his age, though he has nothing in the land, as the vouchee, the prayee in aid, &c. Br. Age, pl. 3. cites 9 H. 6. 46.

[4. If a feme, tenant in dower, vouches the heir of her baron, and the baron of the heir, the parol shall not demur for the non-age of the baron, his feme being of full age, because the baron is vouched only for the heritage of the feme. 28 E. 3. 99. b. adjudged.] Fitzh. Age, pl. 110. cites S. C. accordingly.

[5. But the parol ought to demur if both are within age. \* 28 E. 3. 99. b. But quære. So it should demur if the feme † was within age, though the baron was of full age. Contra 28 E. 3. 99. b. per Will.] \* Fitzh. † Fol. 145.

Age, pl. 110. cites S. C.

[6. If the youngest son enters into the heritage descended, the parol shall not demur for his non-age if he be vouched as heir within age, if the eldest son be of full age who is heir in right, because he cannot be heir by continuance, 21 E. 3. 46.] [156] Br. Parol Demur, pl. 12. cites S. C. per Thorpe.

[7. If a bastard be vouched within age by reason of his possession, the parol shall demur for his non-age, because he may be heir by continuance] \* Br. Parol Demur, pl. 12. cites



S. C. per *continuance* all his life without being reclaimed. \*21 E. 3. 46;  
 Thorpe.— 11 E. 3. Age 3.]  
 8 Rep. 101.  
 b. S. P. in a nota by the reporter, cites 20 E. 3. Voucher 129.—S. P. Co. Litt. 244. b.

Fitzh. Age, [8. If an *infant* be *vouched* by *lessee* for *life*, by reason of the re-  
 pl. 59. cites *version*, which he has by *descent*, the *parol* shall demur, though he  
 S. C.— has not the *franktenement* by *descent*. 30 E. 3. 17.]  
 See (G) 3.  
 & 7. and the notes there.

The mischief 9 Stat. W. 2. 13 E. 1. cap. 40. *Where any doth alien the right*  
 before the of his wife,  
 statute was,

That when the husband aliened the right of his wife, this working a discontinuance, and the wife driven to her *cui in vita*, or her heir to his *sur cui in vita*, those just actions were delayed oftentimes, when the purchaser vouched the heir of the baron being within age, until his full age, which is remedied by this act. And this act *restrains the common law*, and therefore it is taken *stricti juris*. 2 Inst. 455.

This suit of It is agreed that from henceforth the suit of the woman, or her heir,  
 the wife, or after the death of her husband,  
 her heir ex-

tends only to a *cui in vita*, or a *sur cui in vita*, which are the proper actions upon an alienation made by the baron of the right of his wife, the former words being [*Cum quis alienat jus uxoris sue* :] for if the wife be *tenant in tail*, and the baron aliened in fee, and died, and the wife died, the *issue* in tail cannot have a *sur cui in vita*, but he must have his *formedon* in the descender by the stat. of W. 2. cap. 1. and in this action the purchaser may vouch the heir of the baron, and for this non-age the *parol* shall demur; for that action is not of this statute. 2 Inst. 455.

This by the Shall not be delayed by the non-age of the heir, that ought to war-  
 context of rantise,  
 this act ex-  
 tends only to the heir of the baron who made the alienation, and therefore the heir of a stranger is out of this statute. 2 Inst. 455.

If the *vouchee* who is *tenant in law* vouches the heir of the baron in a *cui in vita*, the *parol* shall demur by the stat. of Westm. 2. cap. 40. For though the words of the statute are general, yet they are intended when the *tenant in deed* vouches the heir of the baron, and not when the *tenant in law* vouches him. 1 Rep. 15. Hill. 32 Eliz. in Sir W. Pelham's case, cites 19 E. 3. Age 2.

In *cui in vita* the *tenant* vouched to the warranty one B. who entered and vouched one D. son and heir of one A. and because he is within age, prayed that the *parol* demur, and so it did by judgment, notwithstanding this stat. and therefore it seems that the stat. is intended only of the non-age of him who is vouched by the *tenant*, and not of him who is vouched by the first *vouchee*. Br. Age, pl. 43. cites 13 E. 4. 16.

The baron aliens to A. and hath *issue* 2 daughters, and dies; the wife brings a *cui in vita* against A. who vouched the daughters as heirs to the baron, whereof the one only was within age, the *parol* shall not demur; although all the coparceners, which make but one heir, are not within age, and the words are per minorem etatem heredis, yet seeing by the common law the *parol* for the whole should have demurred, judgment shall be given for the demandant, and the *tenant* shall attend for his warranty in the whole in this case, until the full age of the coparcener, that then is within age. 2 Inst. 455.

As the ac- But let the purchaser tarry, which ought not to have been ignorant  
 tions that he bought the right of another.  
 wherein the

voucher shall be, and the heir to be vouched are set down in certain, so the person that is to vouch is also specified, so as if any other vouch the heir of the husband, the *parol* shall demur for his non-age, and therefore the purchaser or buyer of the husband is only he, by reason of this word (*Emptor*) that is bound by this statute. 2 Inst. 455.

[157] And therefore this *emptor* must have 3 properties; 1st. He must be *emptor*, that is, purchaser immediately from the baron, and therefore if this *emptor* aliens in fee, the alienee is *emptor*, that is, a purchaser; but because he is not the immediate purchaser from the baron (albeit he may vouch the heir of the baron as assignee) yet is not he bound by this statute. 2dly. He that is an *emptor* within this act, must be the *tenant in deed* against whom the *cui in vita*, or *sur cui in vita* is brought; and therefore in the case before, if the 2d alienee vouches him that was immediate *emptor*, yet if he vouches the heir of the husband, the *parol* shall demur for his non-age, and the demandant shall not have judgment maintainant, because the *cui in vita*, &c. was not brought against him that was immediate *emptor*, as *tenant in deed* of the land, but he came in as *vouchee*; so it is if



if he that was immediate emptor cometh in by receipt upon default of tenant for life, he is not bound by this act, causa qua supra. 3dly. He must be ipse emptor, and not alter ipse, and therefore if the immediate emptor dies, albeit his heir sitteth in his ancestor's seat, and is alter idem, yet the heir is not bound by this, because he is not ipse idem. 2 Inst. 456.

He that purchases any estate of freehold, be it in fee-simple, fee-tail, or for life, he is an emptor or purchaser within this act, and yet the words thereof be, qui alienat jus uxoris suae. 2 Inst. 456.

Also if baron aliens, though it be for no valuable consideration, yet is he an emptor, that is, a purchaser within this stat. 2 Inst. 456.

*Until the age of his warrantor, to have his warranty.*

And at the full age of

the vouchee the tenant shall sue a re-summors. 2 Inst. 456.—Sec (P)

This act extends as well to a warranty in law for example in respect of a reversion, &c. as to a warranty in deed. And albeit the stat of 32 H. 8. notwithstanding the alienation of the husband, &c. gives to the wife and her heirs a right to enter, as by that act appears, so as the wife or her heirs are not driven to their action, as at the time of the making of this act they were; and therefore this act may seem to some to be of no great use, yet for divers points of notable learning, and for the discussing of like cases standing upon like reason, Ld. Coke says, he held it very profitable and necessary to be explained. 2 Inst. 456.

10. In a præcipe quod reddat the tenant vouched, and the sheriff afterwards returned that the vouchee was dead. The question was, whether the tenant might revouch at large one as son and heir, and so pray that the parol might demur for the non-age. It was clearly the opinion of the court, that if he was not under age the tenant might revouch at large, because the first vouchee never entered into the warranty; but whether one within age might be vouched, the court would advise. D. 7. pl. 7. Trin. 28 H. 8. Anon.

11. In a formedon the tenant vouched one J. as cousin and heir to Sir R. T. and prayed that for his non-age the parol might demur; but by C. B. he ought to shew how he is cousin. D. 79. pl. 47. Hill. 6 & 7 E. 8. Colvil v. Huddleston.

S. C. cited 6 Rep. 5. 2. in Markhal's case, and also cites 16

E. 3. tit. Age, and 15 E. 4. 46 E. 3. 25. and 31 E. 3. tit. Voucher 54.

## (K) Parol demur. Prayee.

[1. IF in an action against tenant by the curtesy he prays in aid of the heir within age, the parol shall demur. 43 E. 3. 36.]

S. P. Br. Age, pl. 59. cites 40 E. 3.

13. (b).—But if a writ of error be brought against a tenant by the curtesy, the parol shall not demur for the non-age of him in reversion, said by Haughton, and agreed by Coke, because he is not tenant. Roll. Rep. 251.

[2. But in scire facias against tenant by the curtesy to execute a recovery in a contra formam collationis against an abbot, if he prays in aid of the heir within age, the parol shall not demur. 2 H. 4. 16. b.]

Br. Age, pl. 11. cites S. C. Aid lies but not age.—See (B) pl. 29. S. C.

[3. If lessee for life has aid of the remainder within age, who is in by descent, the parol shall demur. 7 H. 4. 42. b. \* 11 H. 4. 74. b. 24 E. 3. 32. b. + 27 E. 3. 87. But otherwise it is if he be in as right heir to J. S. which is by purchase. 7 H. 4. 5. adjudged. 11 H. 4. 74. 27 E. 3. 87.]

[158]

\* As scire facias upon a fine, the tenant said that the fine was levied to him, the remainder to the right heirs of W. N. who was dead at the time of the fine, and J. is heir

*heir to W. V.* and prayed aid of him, and that the parol demur for his non-age, and the aid was granted, but the opinion was that the age does not lie, because he is purchaser by name of heir, and shall not be in ward, nor pay a relief, and yet it was agreed that bastardy was a good plea. Br. Age, pl. 15. cites S. C. — Fitzh. Age, pl. 25. cites S. C.

† Fitzh. Age, pl. 108. cites S. C.

\* Fitzh. [ 4. [So] if lessee for life has aid of him in reversion within age who is in by descent, the parol shall demur. \* 11 H. 4. 30. † 11 H. 4. 29. H. 6. 10. b. † 18 E. 3. 33. 30 E. 3. 17. 14 E. 3. Age 87. adjudged.]

and though it was objected that the land was gavelkind, and that the custom is, that the heir shall have his land at 15, and may alien it at such age, and that in this case the heir was more than 15; but the court held, that as to the prayer in aid, they ought to adjudge according to the common law, and unless other matter was shewn, the parol should demur.

† Fitzh. Age, pl. 17. cites S. C.

† Fitzh. Age, pl. 13. cites S. C.

Fitzh. Age, pl. 108. cites S. C. [ 5. If lessee for life be, the remainder to the right heirs of J. S. who is dead, and after the right heir dies, his heir within age, and lessee has aid of him, the parol ought to demur, for he is in by descent. 27 E. 3. 87.]

Fitzh. Age, pl. 108. cites S. C. [ 6. So if J. S. at his death has 2 daughters and heirs, and after the one dies, and her part descends to her daughter within age, the parol ought to demur for her non-age, though the aunt be in by purchase. 27 E. 3. 87.]

\* The age was denied, because he did not pray it at first, nor pray it in Chancery, [ 7. In annuity against a parson, if he has aid of the ordinary and patron within age, yet the parol shall not demur for the non-age of the patron, for the charge does not lie upon the patron, but upon the parson. \* 11 H. 6. 10. b. † 21 H. 7. 41. 15 H. 7. Age 127. adjudged.]

before *procedendo* granted, and also the loss is not to fall upon the patron, but upon the parson; per Babington. But Brooke says it seems to him that this is but a slender reason; for by this the patronage is the worse, which is the cause that the parson shall have aid of the patron. Br. Age, pl. 72. cites 11 H. 6. 11. — Fitzh. Age, pl. 17. cites S. C. — Br. Aid del Roy, pl. 105. cites S. C.

† S. P. But Keble was of opinion, that for the same reason that the parson shall have aid of the patron, the patron shall have his age. Br. Age, pl. 29. cites 21 H. 7. 41. and there is a quere, whether when the patron comes by process, he may not have his age, though the parson cannot have it at his prayer. — Fitzh. Age, pl. 127. cites S. C. — S. C. cited by Haughton J. Roll Rep. 323.

\* Fitzh. [ 8. If he in reversion by descent be reseived for default of the lessee, the parol shall demur for his non-age, though the statute is *paratus petenti respondere*. \* 18 E. 3. 32. b. 19 E. 3. Age 1. adjudged, as I apprehend it. † 32 E. 3. Age 52, 53. adjudged. 2 E. 2. Age 79. adjudged. 14 E. 3. Age 86. adjudged. 9 E. 2. Age † 142. adjudged. 13 E. 2. Age 147. adjudged. 30 E. 1. Itinere Cornub. Age 150. adjudged.]

† This should be pl. 143. for though both pleas are of the same year, yet pl. 142. is of a different term, and not S. P.

In *scire facias* out of a fine the tenant pleaded to issue, and then made default, whereupon came one R. and said that the tenant had but for term of life, the reversion to him, and prayed to be received, and was received, and pleaded to issue, and afterwards died pending the issue; whereupon came one S. and said that R. is dead, and that he is son and heir to R. and that he has the reversion by descent, and prayed to be received, and so he was, and said that R. his father died seized of the reversion, which descended to him, &c. and that he is within age, and prayed, &c. But Herle bid him defend his right now that he was received, or otherwise seisin should be given of the land; whereupon S. pleaded in bar, and so to issue. Fitzh. Age, pl. 112. cites Trin. 7 E. 3. 32.

[ 159 ] — S. C. cited D. 298. b. in pl. 28.

[9. [8] If 2 in reversion by descent are received for default of the lessee, and the one is within age, the parol shall demur. 18 E. 3. 12. adjudged.]

[10. [9] If a feme in by descent be received by default of her baron, the parol shall demur for her non-age, though the \* statute be paratus petenti respondere. † 18 E. 3. 33. 5 E. 3. Age 61. adjudged.]

\* 13 E. 1. cap. 3.  
† Fitzh. Age, pl. 13, cites S. C.

[11. [10] In an avowry for a rent-charge reserved upon a purparty, if the plaintiff, lessee for life, has aid of him in reversion within age, who is in by descent in the reversion, yet the parol shall not demur. 16 E. 3. Age 48. adjudged. It seems by this, that the land is not in demand. See the book in aid 131. This was in a second deliverance, where the father of the prayee was summoned to join in aid in the first action, and made default, but it seems that this does not alter the case.]

Fol. 146.

12. In *præcipe quod reddat* the tenant made default, and after default came J. N. and prayed to be received, inasmuch as W. S. was seised in fee, and infeoffed the tenant and the father of the prayee, and the heirs of the father of the prayee, and his father died, and he is within age, and prayed to be received, and that the parol demur for his non-age, and it was admitted that the parol should demur; but it is said there, that in an ancient book it is adjudged that the heir upon receipt shall not have his age; for the statute says that he shall be paratus petenti respondere. Br. Age, pl. 70. cites 44 E. 3. 6.

## (L) At what Time it ought to be demanded.

[1. IF a man has aid of an infant, and of the king, because the infant is in ward to him after a procedendo, the parol shall not demur upon demand for the non-age of the ward, though it ought to have been granted if he had demanded it at the time of the aid prayer; for the procedendo commands the judges to proceed, and he ought to have shewn it in Chancery, in stay of the procedendo. 11 H. 6. 10. b.]

Br. Age, pl. 72. cites S. C. and it was denied, because he did not pray it at first.—Fitzh. Age, pl. 17. cites S. C.

See (K) pl. 7. S. C. and the notes there.

## (M) Counterplea. What shall be a good Counterplea.

[1. IF a man says in an action, in which the age lies, that his ancestor was seised in fee, and died seised, and this descended to him within age, and prays his age, it is a good counterplea that his ancestor did not die seised. 29 E. 3. 6. b. But quære.]

In *præcipe quod reddat* the tenant said that his father was seised, and

did seise, and he is in as heir, and prayed his age, and the demandant said that the father of the tenant had nothing in demesne, in reversion, nor in action. Per Finch, This is no plea; for you ought to shew that he abated, or the like; for otherwise it is only argument; for it may be that he recovered as heir, or that he entered by reversion descended, &c. wherefore Finch awarded that he shall have his age. Br. Age, pl. 7. cites 43 E. 3. 18.

[160]

[ 2. If an *infant*, upon default of the tenant, prays to be received, because the tenant is tenant by the curtesy after the death of his mother, the reversion to him by descent as heir to his mother, and prays the parol to demur, it is a good counterplea of the age that the land was given to the mother and the first baron in special tail, and the baron died without issue, and she took the tenant for her 2d baron, so the 2d baron in by abatement. 32 E. 3. Age 55.]

It ought  
not to be  
by argument.  
Roll Rep.  
325. per

3. A counterplea to bar another of a right of privilege, which he ought to have by the law, as that of age is, *ought to be full and certain*; per Crooke J. Roll Rep. 325. cites 3 E. 3. 49. 4 E. 3. 40.

Crooke J. cites 43 E. 3. 18. — 3 Bulst. 144. S. P. by Coke Ch. J.

4. It is a good counterplea of age of a vouchee, *that he is dead*; per Crooke J. Roll Rep. 325. cites 7 E. 3. 27.

5. In *præcipe quod reddat* the tenant alleged descent, and that he is in as heir, and within age, and prayed his age, it is a good counterplea that the tenant and his father purchased jointly, and he is in by the survivor, and traverse the descent. Br. Counterplee de Aid, pl. 30. cites 39 E. 3.

S. P. by  
Crooke J.  
Roll Rep.

6. It is a good plea *that he had an elder brother*. D. 137. pl. 26. Hill. 3 & 4 P. & M.

325. cites 27 H. 6. 1. 4 E. 3. 41 E. 3. 28. — S. P. by Coke Ch. J. 3 Bulst. 144. cites 4 E. 3. 40.

S. P. by  
Crooke J.  
Roll Rep.

7. So it is a good plea *that his father was attainted, &c.* D. 137. pl. 26. Hill. 3 & 4 P. & M.

325. cites 40 E. 3. 14. 48 E. 3. 21 E. 4.

*Bastardy* is  
a good plea  
in a forme-  
don in re-  
mainder.

D. 137.  
pl. 26. Hill.

8. Counterplea of age shall not be, but *where it appears that he is not heir, as a bastard, or one who is not in as heir, but by purchase, or in case of inevitable necessity*; per Coke, Crooke, & Haughton. Cro. J. 393. pl. 5. Mich. 13 Jac. B. R. in case of Herbert v. Binion.

3 & 4 P. & M. — S. P. by Crooke J. Roll Rep. 325. cites 40 E. 3. 14. 48 E. 3. 21 E. 4.

(N) In what Cases, if the Parol demur *against one*, it shall *against another also*.

[ 1. ] If 2 are vouched, if the parol demur for the non-age of the one, it shall demur for the other also. 45 E. 3. 23.]

[ 2. If aid be prayed by 2 coparceners, scilicet, the aunt and the niece, and the aunt has the remainder by purchase, and the niece is within age, and has the remainder by descent, the parol shall demur for both. 27 E. 3. 87.]

[ 161 ]

So in writ  
of error by

one coparcener. Br. Age, pl. 58. cites 9 H. 9. 47. But it should be 9 H. 6. 47. a.

[ 3. So if aid be prayed by one coparcener of 2 other coparceners, of whom the one is within age, and the other of full age, the parol shall demur for all. 33 E. 3. Aid of the king 109.]

[ 4. If one coparcener has aid of the other within age, if the parol shall

shall demur for the non-age of one, it shall demur for both. 9 H. 6. 47.]

[ 5. If the *tenant vouches himself and J. as heirs*, and *J. is within age*, the parol shall demur for both. 13 E. 3. Itinere North. 52. adjudged.]

not the S. P. and therefore seems misprinted.

[ 6. In *dum fuit infra ætatem* by 2 coparceners of the seisin of their \* coparceners, [ancestor] for the non-age of one of the demandants, all the parol ought to demur. D. 3. 4 Ma. 137. 25. 30 E. 3. 7. b.]

\* Fitzh. Age, pl. 82. cites S. C. and there the word is (ancestor.)

The words of D. 137. b. pl. 25. are, that in *dum fuit infra ætatem* of the demise made by his ancestor who died before his full age, or for the non-age of one of the demandants the entire parol shall demur.—[And so the word coparceners in the last place seems to be put in by mistake of the printers.]

[ 7. So the parol shall demur for both in a *non compos mentis* by 2 coparceners of the seisin of the ancestor for the non-age of one. D. 3. 4 Ma. 137. 25.]

Fol. 147.

[ 8. [So] In a writ of *entry sur disseisin* by 2 coparceners, of which the one is *within age*, *qui non prosequitur* upon summons, yet the parol shall demur against the other also. 12 E. 1. Itinere Wilts; Age 130. adjudged.]

[ 9. If a writ of error be brought against the heir of the recoveror, *within age*, and a *scire facias* against the tertenant, if the parol demurs for the heir, yet it shall not demur as to the tertenant. 9 H. 6. 4. b. For the heir shall not be at any prejudice if it be reversed as to the tertenant.]

S. P. Br. Error, pl. 9. cites 9 H. 6. 46. says it was much argued, if the parol

should demur against both, or proceed against the tertenant, but leaves it a quære.—Fitzh. Error, pl. 20. cites 9 H. 6. 46. and the book in Roll seems to be misprinted.—Fitzh. Age, pl. 16. cites Mich. 9 H. 6. 17. that the parol shall demur as to the heir, but that they shall go to the examination of the errors as to the other immediately.—S. P. Br. Age, pl. 21. cites 19 H. 6. 25. which seems to be right, and the book in Roll misprinted.—And Br. Parol demur, &c. cites S. C. and that after long argument it was agreed that it should demur against the heir only, and that the tenant should answer.

[ 10. If a *contra formam collationis* be brought against the abbot, and *scire facias* against the tertenant, who is in *by descent*, and he has his age, yet the parol shall not demur as to the abbot. 9 H. 6. 47.]

[ 11. If 4 enter into a recognizance, and after one dies, his heir *within age*, in a *scire facias* against the heir and the others, the parol shall demur against all. \* 29 Aff. 37. adjudged. 29 E. 3. 39.]

\* Br. Age, pl. 24. cites 24 E. 3. 28. S. P.— Upon this

being pleaded, the parol shall demur against all (if the demandant does not deny it) without process or *scire facias* to be viewed. Br. Parol demur, &c. pl. 16. cites S. C.—Br. Age, pl. 36. cites S. C. and S. P.—Fitzh. Age, pl. 73. cites S. C.—3 Rep. 13. a. b. cites S. C. and 29 E. 3. 50. Sir John Langford's case.

Two entered into a *statute*, and one died; his heir *within age*; it was moved that the entry shall demur, because the *usura recurrit* [non currit] *contra heredem infra ætatem existentem*, and cited 17 Aff. 4. per Mowhrey; and so it was agreed by the court. Het. 59. Mich. 3 Car. C. B. Wilkison's case.—See (C) pl. 7.

[ 12. In a *scire facias* against the tertenants to have execution of damages recovered against J. S. if the parol demurs against one of the

S. P. but

*contra where the tertenant for his non-age, it shall demur against all.* 24 E. 3. 28. adjudged.]

against the ancestor who dies, the heir shall not have his age in scire facias; for the title of the ancestor is disproved. Br. Age, pl. 24. cites S. C.—Fitzh. Age, pl. 102. cites S. C.—S. C. cited 3 Rep. 13. a. And the Reporter infers from thence, that if there be grandfather, father, and 2 daughters, and judgment is given for debt or damages against the grandfather, and then he dies, and the father dies, one of the daughters being within and the other of full age, and partition is made, the eldest shall not be solely charged, but shall take advantage of the infancy of her sister; for both the heirs are but in one and the same degree.

So if one bound in a recognizance has issue 2 daughters, and dies, and they make partition, the one only shall not be charged but shall have contribution, and the one shall take benefit of the non-age of the other; for in such case, though she be charged as tertenant, yet she shall have her age. Ibid. Co. Litt. 270. a. (h) S. P.

See pl. 12. in the notes there.

[ 13. In a scire facias if 2 coparceners are received upon default of the lessee, and the parol demurs for the non-age of one of the coparceners, it shall demur for both. 44 E. 3. Age 37. adjudged.]

14. In mortdancestor, land descended to 4 daughters, the one entered into the whole, and took baron, and had issue and died, the baron leased it to another for term of life of the lessor, and the lessee was impleaded by the two aunts and the niece, daughter to the lessor, by assise of mortdancestor, the tenant vouched his lessor, who came and entered into the warranty and said that E. his feme was seised in fee, and he had issue and is tenant by the curtesy, and prayed aid of A. his daughter, and by her non-age prayed that the parol demur. Belk. said he ought not to have the aid, for she of whom he prays aid is one of the demandants, and therefore he may rebut for parcel and vouch for the rest. But per Thorpe, we may not as here; for the assise shall not be taken by parcel; and Mombray accordingly, and said that the whole assise of mortdancestor shall demur. And Finch. concessit, by which they counterpleaded the aid for 2 parts, and were nonsuited for the third part, viz. the niece was nonsuited, summoned, and severed, and then the parol did not demur. Br. Mortdancestor, pl. 48. cites 40 Aff. 37.

15. If a man vouches 2 as heirs, the one of full age and the other within age, and prays that the parol demur, and the demandant says that he is of full age, and prays venire facias to be viewed, process shall issue against him of full age; per Markham; but per Newton contra, and that no process shall issue till the other be adjudged to be of full age. Br. Process, pl. 61. cites 19 H. 6. 5.

D. 239. pl. 39. S. C. accordingly, because the niece is out of court and the original determined against her, and could not be re-

16. In debt against A. and B. and E. the daughter of C. deceased co-heirs in gavelkind upon an obligation of their father. A. and B. were outlawed, and had their pardon. E. was waived. The plaintiff declared against A. and B. simul cum E. who was waived. The defendants pleaded that E. now one of the heirs in gavelkind, is within age; but adjudged upon demurrer that A. and B. shall answer; for she never appeared as defendant in this suit, and therefore A. and B. shall answer without her. And. 10. pl. 22. Pasch. 27 Eliz. Hawtree v. Awcher.

summoned at her full age, because she never appeared to the court.—Bendl. 146. pl. 205. S. C. accordingly, and the pleadings.—Mo. 74. pl. 203. S. C.



(O) In what Cases the Demurrer of the Parol for Part shall be for all.

[1. **I**N a writ of error upon a judgment for divers things against an infant upon a recovery by his ancestor, if the infant disclaims for part, by which the judgment is to be reversed for error therein, yet the parol shall demur for the non-age of the infant for the residue, and it shall make the parol to demur also for that in which the infant has disclaimed, because this is only one record, and therefore if he has his age of parol he shall have it of all. 47 Ass. 4.]

[2. The same law if in an action against an infant he confesses the action of the demandant for part, yet if the parol demurs for the residue, it shall demur for all. 47 Ass. 4.]

Br. Age, pl. 9. cites 47 E. 3. 7. S. P. per

Tank. that he may confess the action as to part, and have his age for the residue.

[3. If an infant brings a writ of entry sur disseisin to his father, and the tenant pleads the release of the father, as to part of the land demanded, by which the parol is to demur for it, yet it shall not demur for the residue. 19 E. 2. Age 123. adjudged.]

See Stat. Westm. 2. 13 E. 1. cap. 47. which takes away age in

a writ of entry sur disseisin en le per, at (1) supra.

[4. In assise by 3 coparceners, if the tenant claims as tenant by the curtesy of all, and prays in aid of one of the plaintiffs in reversion within age, and has aid of him, by which the parol ought to demur for the third part which belongs to the infant, and not for the residue, yet because the assise shall not be taken by parcels, it shall demur for all. \* 41 Ass. 37.]

\* This is misprinted and should be 40 Ass. 37. and was an assise of mortdances-  
tor, for that

land descended to 3 daughters, and the one entered into the whole, and took baron and had issue a daughter, and died, and the baron leased it to J. S. for the life of the lessor and J. S. is impleaded by the 2 sons and the niece (the lessor's daughter) by assise of mortdances-  
tor, and J. S. vouched his lessor, who entered into the warranty, and said that E. his wife was seised in fee, and he had issue, and is tenant by the curtesy, and prayed aid of A. his daughter, and that for her non-age the parol may demur. Belk. held that aid in this case ought not to be granted, he of whom it is prayed being one of the demandants. But Thorpe e contra, as this case is, because the assise shall not be taken by parcels; and Mombrey agreed and said, that for that reason the intire assise of mortdances-  
tor shall demur, quod Finch. concessit; whereupon they counterpleaded the aid for 2 parts, and were nonsuited as to the third part, viz. A. the niece was summoned, and severed, and nonsuited, and then the parol did not demur. Br. Mortdances-  
tor, pl. 48. cites 40 Ass. pl. 37. — Br. Age, pl. 39. cites S. C. — Fitzh. Voucher, pl. 207. cites S. C.

[5. [So] In assise against an infant of land, whereof he has parcel by descent, and parcel by purchase, by which the parol ought to demur for the descent, but ought not for the other, yet because the assise shall not be taken by parcels it shall demur for all. 41 Ass. 37. per Finchden.]

## (P) Demanded by whom. And Proceedings, Pleadings, &amp;c.

1. **DEBT** against an heir upon the obligation of his father, who appeared by guardian, and said that he was within age, and prayed his age. The plaintiff replied that he was of full age, and prayed writ to make him come to be viewed, and it was granted; but Ston. said that though he should be adjudged of full age, the plaintiff cannot recover his debt, but the defendant shall be compelled to answer, &c. Fitzh. Age, pl. 122. cites Mich. 19 E. 2.

2. In formedon, after the parol has demurred sine die by the non-age of the tenant, at the resummons at his full age he shall plead *non-tenure*. Thel. Dig. 208. lib. 14. cap. 10. f. 2. cites Hill. 26 E. 3. 57.

3. The parol was put without day by the non-age of the vouchee, and at the resummons the tenant said that the vouchee is yet within age; judgment of the writ, which supposed him to be of full age; to which the demandant replied that the vouchee was dead, &c. Upon which the tenant was put to answer over, because the demandant cannot have writ of resummons of other form. Thel. Dig. 208. lib. 14. cap. 10. f. 4. cites Trin. 31 E. 3. Resummons 29.

Br. Age, pl. 31. cites S. C. where it is said that the parol shall not demur in this case.

4. Formedon against tenant for life, who joined issue that *Ne dona pas*, and one came for him in reversion, and said that he in reversion is in ward of the king, and within age, and prayed that the parol demur during his non-age, inasmuch as the tenant pleaded by collusion, and because the reversioner himself, nor any other for the king, did not come, &c. therefore the justices would do nothing, Br. Parol demur, pl. 14. cites 1 H. 6. 4.

5. So at the resummons, after that the tenant has demurred for non-age of the vouchee, the tenant may plead that a stranger has recovered against him after that the parol was discontinued, &c. and conclude to the action, but not to the writ, Thel. Dig. 208. lib. 14. cap. 10. f. 2. cites Trin. 5 H. 7. 39.

6. When the infant, to have the age, shews that his ancestor died seised, and the land descended to him, the dying seised shall not be traversed, but the descent. Roll. Rep. 325. Hill. 13 Jac. B. R. in case of Herbert v. Binion, cites 43 E. 3. 18. 2 H. 5. 8 E. 4. 19. b.

\* Lev. 163. S. C. but says that the issue was found for the demandant. [And upon error brought, the errors assigned be-

7. Formedon in remainder was brought against an infant. The infant by his guardian pleaded that he was in by descent, and prayed that the parol should demur; and upon this issue was taken and found for the \* tenant in the formedon, and after several arguments used in C. B. judgment final was there given, viz. that the demandant should be barred. Writ of error was brought in B. R. and after several arguments the judgment was affirmed, Sid. 252, pl. 22. Pasch. 17 Car. 2. B. R. Amcott v. Amcott,

ing in favour of the infant, shews that judgment was given against him.] The judgment in C. B. was affirmed, nisi.—Raym. 118. S. C. Sed adjournatur.—Keb. 869. pl. 18. S. C. and (says expressly that) by judgment the defendant was ousted of his age, and judgment affirmed, nisi.

## ( Q ) Age triable. How and where.

1. **I**F a man *vouches an infant, or prays aid of him, and prays that the parol demur, and the demandant says that he is of full age, and prays that he be viewed, venire facias to be viewed shall issue.* Br. Process, pl. 141. cites 24 E. 3. 28.

2. But if an infant be impleaded, and appears by guardian, who alleges his age, and prays that the parol demur, process shall not issue to be viewed, but the guardian shall be commanded to bring him in at a certain day, and if he makes default, *petit cape* shall issue. *Quod nota bene.* Br. Process, pl. 141. cites 24 E. 3. 28.

3. An infant brought assise of novel disseisin, and was demanded, and came not, and one as next friend prayed to be received to sue for him according to the statute, and the defendant said that the plaintiff was of full age, *prist*, and it was tried by the assise; per Wich. which Finch. agreed. Br. Age, pl. 10. cites 48 E. 3. 10.

4. The court of Chancery, upon view of the body, and upon examination of several witnesses, and upon view of the church book, adjudged the defendant to be under the age of 21 years. Toth. 135. cites 28 Eliz. Wood v. Wageman.

5. If a tenant in a real action *vouches A. as heir within age, or if tenant for life be impleaded, and prays in aid of A. in reversion, who is within age, and that the parol may demur, &c.* in either of these cases, if the demandant replies that *A. is of full age*, this shall not be tried by the country, for the great delay it would be to the demandants; but a writ shall be awarded to the sheriff, *quod ven. fac. tali die prædict' A. ut per aspect' corporis sui constare possit præfat justic. nostris si prædict' A. sit plenæ ætatis nec-ne, &c.* 9 Rep. 30, 31. Mich. 33 & 34 El. in the case of the Abbot Strata Mercella.

For more of Age in general, see *Enfant, Guardian, Trial*, and other proper titles.

\* There are  
3 *manner* of  
aids of the  
king. 1st,  
Express aid  
as tenant

## \* Aid of the King.

Fol. 148.

### (A) Aid of the King. In what *Actions*.

for life or  
years, or  
farmer ren-  
dering rent,  
are im-

[ 1. ] **I**n *trespass against tenant in fee* of the grant of the king, aid does not lie, because no prejudice can come to the king. 18 H. 6. 12.]

pleaded, they may pray in aid. 2dly, When there is not any express aid to be granted, but there appears some cause of aid, there he shall not conclude to have express aid, but shall conclude judgment *si rege inconsulto*, &c. 3dly, When there is cause of aid, but no aid is prayed before issue, then this writ of rege inconsulto is granted after issue, and a copyholder, or a customary tenant shall not conclude with express aid, nor a purveyor, but judgment *si rege inconsulto*. Arg. Roll. Rep. 206. cites 4 H. 6. 28.

But where in *trespass* the defendant shewed that the place is parcel of the manor of D. whereof the king is seised, &c. and this land is demisable by copy of court roll, and the king at such court leased to him by copy, &c. and demanded judgment rege inconsulto; and per Fitzherbert J. clearly, he shall have aid of the king, and no traverse to the cause shall be here, as not parcel, or not comprised, &c. Er. Aid del Roy, pl. 1. cites 27 H. 8. 28.

[ 166 ]

But in the Chancery no writ of *seareb* shall be granted upon aid in action of *trespass* as here; for the king shall lose nothing. Nota. Ibid.

\* Fitzh. pl. 56. cites S. C. & S. P. [ 2. In *trespass*, aid shall be granted of the king. \* 45 E. 3. 3. 46 E. 3. 28. b. 9 H. 6. 56.]

admitted.——Br. Aid del Roy, pl. 16. cites S. C. and was *trespass* for fishing in Kingston juxta Hull, the defendant pleaded, that he had the vill of Hull of the king in fee farm, rendering 40 l. a year, by charter of the king, which he shews, and that the place where, &c. is parcel of the same vill of Hull, &c. and prayed aid of the king, and had it, notwithstanding that the other alleged that his action is brought in Kingston juxta Hull, so that it shall be intended 2 several places, &c.——Br. Aid del Roy, pl. 97. cites 5 H. 7. 16. S. P.

Br. Aid del Roy, pl. 55. cites 4 H. 6. 10. contra, because he has frank- [ 3. In *trespass de clauso fracto*, &c. aid shall be granted of the king, because by common intendment the *freehold is the cause of the action*, this being for things annexed to the land. Contra 4 H. 6. 10. adjudged 18.]

tenement, and his franktenement is a good plea in *trespass*, and a man shall not recover land nor franktenement in action of *trespass*, but only damages, which is no prejudice to the king; for the aid shall not be granted of the king but for feebleness of estate, or for loss to the king, and neither of them is here; quod nota.

[ 4. In *trespass de bonis asportatis*, or *battery* aid lies not, because the freehold cannot be intended the cause of the action. 4 H. 6. 10. b.]

+ Br. Aid del Roy, pl. 24. cites S. C. [ 5. Aid lies in *trespass upon the case*. + 7 H. 4. 2. b.] [ 6. In an action upon the *case against the king's farmer of a leet* for holding the leet aid lies. \* 18 H. 6. 12. adjudged.]

\* Fitzh. Aid del Roy, pl. 19. cites Trin. 18 H. 6. 11. S. C.

*Tresp* upon the case, in as much as the defendant interrupted the plaintiff to take a mark which belonged to him for a leet, &c. and the defendant claimed the leet by grant of the king, rendering 5 l. a year in the Exchequer by his charter which he shewed forth, and prayed aid of the king, and had it, and yet it is only an action of *trespass*, in which nothing shall be recovered but damages. Br. Aid del Roy, pl. 53. cites 24 E. 3. 6. Sec (D) pl. 7. S. C. (H) pl. 3. S. C.

[ 7. In

[ 7. In an *assise* aid shall be granted of the king in reversion. 4 H. 4. Fitzh. Aid del Roy, pl. 96. cites pl. 19. adjudged.]

S. C. where the reversion was by escheat to the king, but search was denied.

In assise the tenant may have aid of the king, contra of a common person; but per Cheyney and Thirne, where the king leases for life *land of his duchy of Lancaster*, the tenant shall not have aid of the king in assise; for of the dutchy land the king is as a common person, *for he has it as duke*, and not as king. Br. Aid del Roy, pl. 32. cites 11 H. 4. 85.

In assise of novel disseisin against the incumbent of the king of parcel of his glebe, he shall have aid of the king, and the like now in juris utrum; quod nota. Br. Aid del Roy, pl. 95. cites 3 H. 7. 7.

In assise of novel disseisin the defendant shall not pray in aid, but only of the king. 2 Inst. 411. — 8 Rep. 50. S. P. — See Aid of a common person (A) pl. 13.

[ 8. The *indictée* of felony being outlawed brings a writ of error, and hath a *scire facias* against the tertenants and lord; one tertenant comes and says, that the king granted the land to him for life, yet he shall not have aid of the king, because by this writ he had no day in court but to hear the record. 11 H. 4. 53. b.] Br. Scire facias, pl. 76. cites S. C. that he had aid of the king, but nothing is said there about the having no day in court. — Fitzh. Scire facias, pl. 68. cites S. C. & S. P. as to his having no day in court.

[ 9. In *replevin* aid shall be granted of the king. 9 H. 6. 56.]

[ 10. Tenant in fee of the grant of the king shall have aid in real actions, because if the demandant recovers, the king shall change his tenant. 18 H. 6. 13.] [ 167 ]

[ 11. In a *quare impedit* aid shall not be granted of the king, because this is brought upon his own disturbance, and for the mischief of the lapse in the mean time. 5 H. 7. 16.] S. P. if it be not in lieu of voucher, for otherwise nothing shall be recovered but the presentment. Br. Aid del Roy, pl. 97. cites S. C. — Fitzh. Aid, pl. 96. cites S. C. accordingly.

In qua. imp. the defendant shall have aid against the king in lieu of voucher. Br. Voucher, pl. 7. cites 9 H. 6. 56. — Br. Qua. Imp. pl. 7. cites S. C. & S. P. that aid was granted upon charter shewn. — Br. Aid del Roy, pl. 6. cites S. C. — Fitzh. Aid de Roy, pl. 15. cites S. C. — See aid of a common person (A) pl. 22.

In qua. imp. the suit was stayed by a rege inconsulto, because the patronage was in the king, and adjudged, quod sequatur penes dominum regem, and a procedendo prayed and granted in Chancery, and day given to the Attorney General, to shew cause why it should not be granted. Roll. Rep. 290 cites 3 & 4 Ma. Jones v. Elkes.

[ 12. In an action of *forcible entry* the defendant being tenant for life shall have aid of the heir in reversion, and of the king in whose ward the heir is, the defendant making title by the lease of the father of the heir. 22 H. 6. 17. b. 18. adjudged.] Br. Aid del Roy, pl. 47. cites S. C. contra; for no franktenement is to be

recovered in trespass, and he who has franktenement is able to plead to all purposes in trespass; quod nota, by the best opinion, and this notwithstanding that the plea goes in disproof of the reversion.

[The Year Book is, that the granting it was by consent and agreement of the other side, as not being more in delay than a demurrer would be.] — Br. Aid, pl. 85. cites S. C. according to Br. Aid del Roy, pl. 47. — Br. Forcible Entry, pl. 6. cites S. C. accordingly, by the best opinion, and thereupon the defendant pleaded Not Guilty. — Fitzh. Aid del Roy, pl. 23. cites S. C. that aid was granted, because it would be as speedy as a demurrer, but says nothing of the consent. — Fitzh. Aid de Roy, pl. 11. cites 4 H. 6. 12. that aid was denied per cur.]

[ 13. In an *ejectione firmæ* the defendant shall have aid of the king, (it seems the king had the reversion before issue) because by intendment the freehold shall come in debate in this action, the Earl of Kent's case adjudged, cited 3 Jac. B. R.] See (O) pl. 5.

14. In *scire facias* to execute an annuity against a parson, aid was granted of the king, because the dean was patron of the parsonage, The defendant shall have aid of

the king in  
*scire facias*  
upon a recog-  
nizance notwithstanding the statute. Br. Scire facias, pl. 90. cites title Aid of the King, 39.

15. In *præcipe quod reddat* against tenant of the king, who holds of him by *rent and services*, the tenant shall not have aid of the king, unless the title of the demandant be elder than the title of the king to the seignior; for otherwise he who recovered should hold by the first services. Br. Aid del Roy, pl. 13. cites 35 H. 6. 56. per Prisot.

16. In *petition of right* by Sotell in trespass, the defendant said, that the king leased to him for years, and prayed aid of the king, and had the aid, but he shall not have search, to see that it is admitted that the lessee for years shall have aid of the king in trespass and yet no franktenement is to be lost; per Billing, where tenant for life, the reversion to the king, has aid of the king, he shall not have search. Br. Aid del Roy, pl. 60. cites 9 E. 4. 52.

17. In a *quod permittat of a common* against tenant for life of the land of the lease of the king, he shall have aid of the king. Br. Aid del Roy, pl. 93. cites 2 H. 7. 11.

18. In writ of *error to reverse a judgment*, the defendant in error prayed aid of the king, but denied per tot. cur. because no land is in demand, but only collaterally; but afterwards when the lands come once in question, then aid shall be granted, but never before. Bulst. 218. Trin. 10 Jac. Baker v. Nichols.

[ 168 ]

This statute having not been printed till towards the latter part of the reign of H. 8. and

19. 4 E. 1. stat. 3. cap. 3. Concerning the endowment of women, where the guardians of their husbands inheritance have wardship by the gift or grant of the king, or where such guardians be tenants of the thing in demand; or if the heirs of such lands be vouched to warranty, if they say that they cannot answer without the king, they shall not surcease upon the matter therefore, but shall proceed therein according to right.

thereby as it seemeth not commonly known, there have divers aid-prayers been granted directly against both points of the purview of this statute, as well when the writ of dower hath been brought against the king's grantee or committee, as where the heir came in as vouchee in his custody, and the like rule Brian gave in 4 H. 7. but when Justice Townsend remembered him of this statute of Bigamis, the aid was over-ruled. 2 Inst. 271.

And at the parliament holden in 18 E. 1. an act is in the parliament-roll thus entered, *Quod viduæ recipiant dotem de terris in custodia regis existentibus, dominus rex præcepit iusticiariis de banco, quod viduæ post mortem virorum suorum petant dotem suam, &c. et quod in placitis illis procedant secundum communem legem regni, & quod partibus faciant debitum justiciæ complementum.* 2 Inst. 271.

So as seeing the letter of this chapter of 4 E. 1. extends but where the king hath granted the custody over, or where the heir came in as vouchee, the act of 18 E. 1. made about 14 years after, addeth that these widows shall recover dower against the heir in the custody of the king, where the king granteth not the custody to any, but keepeth the lands in his own hands. And Ld. Coke says he is verily persuaded, that seeing the granting of aid where no aid was grantable, was not any error (whereby the judgment might be reversed,) some judges, either for that cause or for fear, have granted aid of the king in many cases, where it was not to be granted by law; and the rather for that in ancient times, aids of the king were little or no delay at all; for writs of *procedendo* were speedily granted; whereas of latter times aid-prayers, and especially writs *de domino rege inconsulto*, are used merely for delay of justice, and that for no small time. 2 Inst. 271.



## (B) In what Cases it lies, contrary to the Supposal of the Writ.

[ 1. ] **I**N an *assise* of S. in the county of H. if the tenant says that the land is in F. which is in the county of E. and that the king gave it to him, rendering 40l. rent per annum, he shall not have aid of the king, because this is contrary to the supposal of the writ; so that if aid should be granted the writ would abate, and the tenant is at no prejudice if he hath not the aid. 21 E. 3. 19. adjudged.]

See ( Q )  
Pl. 1. S. C.  
—S. P.  
Though the  
plaintiff re-  
covers in  
the county  
of H. Br.  
Aid del  
Roy, pl. 43.

cites S. C.—Fitzh. Aid de Roy, pl. 2. cites S. C.

[ 2. In a *dum fuit infra ætatem*, if the tenant says that he holds by virtue of a lease from the king by his patent, and shews it forth, by which it appears that he hath but a chattel, and not a freehold, which is contrary to his own acceptance, for he hath accepted the writ good, yet because the king's right shall not be tried without the king, he shall have aid of the king. 31 E. 3. Aid del Roy 69. adjudged.]

Fol. 149.

## (C) Upon Demand of what Thing. Of another [ 169 ] Thing than that which is in Demand.

[ 1. ] **I**F the king's farmer be sued upon his own grant, made by him after the grant of the king, he shall not have aid. 48. Ed. 3. 18.]

Aid of a  
common  
person (E)  
pl. 1. cites

S. C. but not clearly S. P. — Br. Aid del Roy, pl. 19. cites S. C. As where covenant was brought by the vill of N. against the vill of D. for that they covenanted with them that they should be quit of toll in D. and that they had taken toll; and those of D. said, that they had their will of D. of the king in fee-farm, and prayed aid of the king, and because this is their own covenant and deed after the fee-farm, they were ousted of the aid. Br. Aid del Roy, pl. 19. cites 48 E. 3. 18. — Fitzh. Aid de Roy, pl. 59. cites S. C. accordingly, for the king is not endamaged by it.

[ 2. If a common be demanded to issue out of the land of the king's lessee for life, he shall have aid of the king. \* 6 Hen. 4. 5. b. 4 Hen. 6. 11. 19. + 1 Aff. 1. adjudged.]

\* Fitzh.  
Counter-  
plea of Aid,  
pl. 13. cites

S. C. but not S. P. — + Fitzh. Aid de Roy, pl. 86. cites S. C. says the court gave day, &c. and in the mean time to speak with the king, &c.

[ 3. [So] If a rent or common be demanded to issue out of the land of the king's lessee for life, he shall have aid of the king. 6 H. 4. 5. b. 4 Hen. 6. 11. 19. \* 3 Aff. 1. adjudged, though the aid be granted of another thing which is not in demand.]

\* Br. Aid  
del Roy, pl.  
70. cites  
S. C. ac-  
cordingly,  
and af-

terwards came a procedendo, but not to go to judgment rege inconsulto. — Fitzh. Aid de Roy, pl. 87. cites S. C.

[ 4. If a common be demanded to issue out of the land of the fee-farm

\* See (G) *farm of the king, rendering rent, he shall have aid of the king.*  
pl. 6. S. C. 13 Hen. 4. Aid del Roy 99. Curia. Dubitatur \* 46 Ass. 1.]

\* Br. Aid del Roy, pl. 75. cites S. C. but seems to be contra; for [ 5. If a common be demanded to issue out of the lands of the king's tenant of the gift of the king, discharged of common, he shall have aid, though he is to have aid of another thing than that which is in demand. \* 25 Ass. 8. † 29 Ass. 19.]

they were in doubt if he shall have aid, because the gift is of the land, and the assise is of the common, and so another thing than is given; and per Shard J. aid is not grantable by deed which commenced before the title of the action of the plaintiff accrued.

† Fitzh. Aid de Roy, pl. 75. cites S. C. but not S. P.

6. Where a man claims to be *discharged of toll* in a vill where the king has fee-farm, aid of the king shall be granted to the vill. Br. Aid del Roy, pl. 93. cites 2 H. 7. 11.

## [ 170 ] (D) In what Cases it shall be granted of the King, where the King is Party.

Br. Aid del Roy, pl. 24. cites S. C. But Brooke says it is briefly reported. [ 1. ] *IN trespasss by the king for taking of toll of his tenants, who are toll-free, the defendant justified as fee-farmer (as it seems) of the king, and had aid of the king. 7 H. 4. 2. b.]*

Br. Aid del Roy, pl. 50. cites S. C.— Fitzh. Aid de Roy, pl. 97. cites S. C. [ 2. If an office be found for the king, that such a one held of the king in chivalry, and died his heir within age, by which he seized the ward, and committed it to another during the non-age, upon which another comes and traverses the office, and upon this a *scire facias* issues against the patentee, who comes and shews that the king granted the ward to him, and prays in aid of the king; yet he shall not have it, because the king is party to the plea, and the patentee may join to the king by force of the *scire facias*. 15 Hen. 7. 10. per curiam.]

See (H) pl. 14. S. C.— Br. Aid del Roy, pl. 50. cites S. C.— Br. Aid del Roy, pl. 84. [ 3. But if the office be traversed, and found false, and after a *scire facias* is granted against the king's lessee, he shall have aid of the king. (It seems,) because that now the king is not party; for the plea between him and the plaintiff is determined. 37 Ass. 11. adjudged.]

cites S. C. & S. P. accordingly; and Brooke says, and so see that where the king is intitled by office, as he was here, his patentee shall not be ousted without being warned to answer to it. *Quod nota.*— Br. Petition, pl. 17. cites S. C.

Br. Aid del Roy, pl. 50. cites S. C. & S. P.— Fitzh. Aid del Roy, pl. 97. cites S. C. & S. P. [ 4. If a patentee be to have a recompence in value against the king, he shall have aid of the king, though the king be party, because he shall not have the recompence without aid. 15 H. 7. 10. per curiam.]

Fitzh. Aid de Roy, pl. 10. cites S. C. [ 5. Where the cause of the action is more ancient than the cause of the aid prayer of the king, the aid does not lie. 4 Hen. 6. 12.]

[6. *As in trespass for a trespass in the time of H. 4. If the defendant says that after the trespass an office was found that such a one died seised after the trespass supposed his heir in ward to the king; he shall not have aid \* of the king, because the cause of the aid is after the trespass supposed.* 4 Hen. 6. 12.]

\* Fol. 150.

[7. In an action upon the case against the king's fee-farmers of a leet, if the plaintiff claims the leet by prescription and the farmers by grant of the king since time of memory, and so after the title of the plaintiff, yet the farmers shall have aid, for that perhaps the king hath barred or may bar him of the \* leet, or hath a release. 18 Hen. 6. 12. adjudged.]

(A) pl. 6. S. C. — Fitzh. Aid de Roy, pl. 19. cites Trin. 18 H. 6. 11. S. C. and because

a fee-farm rent was reserved, and so it might be of prejudice to the king, the aid was granted. — S. P. Arg. Roll Rep. 292.

\* The original is misprinted (Ley.)

8. Where one has cause of voucher or warranty of charters against a common person, in such case he shall pray aid of the king; for he cannot vouch him nor have quare impedit against him. Br. Aid del Roy, pl. 6. cites 9 H. 6. 56.

[ 171 ]

(E) Upon what Plea. In what Case it shall be granted, where it appears the King hath no Title,

[1. IF the party himself who prays in aid acknowledges any matter that would foreclose him of aid, he shall be ousted of aid. 39 Edw. 3. 12. b.]

[2. If a man prays in aid of the king, and shews for cause of the aid the king's grant, if upon his plea it appears to the court that the grant is void, he shall be ousted of aid. Pasch. 15 Jac. B. R. between Lightfoot and Levett, resolved per curiam.]

Cro. J. 421. pl. 2. Lightfoot v. Lenet S. C. adjudged accordingly.

ingly. — Bridgm. 88. Lightfoot v. Lerret S. C. adjudged that the grant being void, the defendant should be ousted of the aid.

*Scire facias to be restored by virtue of an act of parliament of restitution for the heir of the Earl of Lancaster.* He in reversion was attainted and his heirs restored before the reversion fell, and afterwards the king granted the same reversion to this defendant, and granted that if he or his heirs be ousted or evicted, unless by their own proper act that the king will make it up in value, and this grant was after the restitution, and yet upon this matter the grantee had aid of the king; for the patent of the king shall not be avoided without making him a party, and the words above are sufficient to have in value of the king. Br. Aid del Roy, pl. 62. cites 39 E. 12.

[3. *As in replevin of cattle taken, if the defendant avows the taking, because the king granted to him by letters patent that he should take for all cattle that should pass over Willoe Brig in Yorkshire, so much for toll as hath been usually taken there & alibi within the realm of England; and avers that at another Brig, viz. Burrow Brig, in the same county, 6 d. had been usually taken for every twenty cattle for toll, and according to this rate he avows the taking, and shews that upon this grant the king had reserved a rent and prays in aid of the king; but he shall not have aid upon this plea, because it appears the grant is void for the uncertainty of the place and thing to which the reference is made, scilicet & alibi infra regnum Anglia,*

Cro. J. 421. pl. 2. S. C. adjudged accordingly. — Bridgm. 88. Lightfoot v. Lerret accordingly.

glia, which is too large, and the grant is in the copulative that he should take tantum quantum had been usually taken at Willoe Brig & alibi; and it is *not averred that any thing was usually taken at Willoe Brig* ergo. Pasch. 15 Jac. B. R. between Lightfoot and Levett adjudged.]

See (M) pl.  
11. S. C.

[ 4. If a man makes *consuance as bailiff* of the king for rent-arrear, if the *avowry* be *not good* he shall not have aid. 4 Hen. 6. Aid del Roy 121.]

Crc. E. 693.  
pl. 3. Mich.  
41 & 42  
Eliz. B. R.  
Foxley v.  
Annesley  
S. C. and  
S. P. ac-  
cordingly;

[ 5. In *trover* and conversion of goods, if the defendant pleads that the king was seised in fee of the manor of D. and that certain persons unknown stole the said goods of the plaintiff, and brought them within the manor, and there them left and waived, per quod the defendant, as the queen's bailiff of the said manor, seized them to the use of the queen as goods waived which is the same trover and conversion, and demands judgment si regina inconsulta; he shall not have aid of the queen upon this plea, for it does not appear by this plea that the goods were forfeited to the king, [queen] inasmuch as it is *not alleged that the felon waived them in pursuit, or for fear of being apprehended*, thinking himself pursued, fled, and waived the goods. Co. 5. Foxly 109.]

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but Gawdy  
and Pop-  
ham held

that he should not have aid, because it is *but a chattle*, and he hath *not alleged that he had answered for it to the queen*; and adjudged that he answered without aid. Cro. E. 693. pl. 3. Mich. 41 & 42 Eliz. B. R. Foxley v. Annesley.—Mo. 572. pl. 785. S. C. adjudged per tot. cur. that the aid is not grantable, because it is in action transitory, not local.

D. 25. pl.  
164. S. C.  
and adds  
that the  
grant was  
fine com-  
poto red-  
dendo, and  
adjudged  
that he shall

6. The king granted the *custody of a lunatick and of his lands quamdiu* he should be a lunatick to take the profits to his own use. The patent was adjudged void, and therefore the patentee cannot have aid of the king; for nothing passed, the king being to apply the issues and profits of the lands of lunaticks to the maintenance of the lunatick's wife and family, and not to take any thing to his own use. And. 23. pl. 48. Hill. 28 H. 8. Holmes's case.

not have aid.—Mo. 4. pl. 12. S. C. accordingly.—Bendl. 17. pl. 23. S. C. adjudged accordingly.—S. C. cited as adjudged accordingly, because the grant was void. 4 Rep. 127. b.

7. In ejectment by Grey lessee of the EARL OF KENT v. BAUDE lessee of the EARL OF NORTHUMBERLAND for years, the reversion whereof came to the queen by forfeiture for rebellion, he prayed aid of the queen, which was granted. But at length, because *no title appeared clearly for the queen for the escheat*, a procedendo in loquela was granted by the advice of Catlyn and Dyer, but not to go to judgment regina inconsulta. D. 320. a. pl. 18. Mich. 14 & 15 Eliz.

Le. 284. pl.  
385. S. C.  
according-  
ly.—4 Le.  
87. pl. 114.  
S. C. in to-  
tidem ver-  
bis.

8. A writ of *dower* was brought of certain manors, and the tenant in a writ of *circumspecte agatis* set forth that the *husband held one of the said manors of the king in capite and died seised his heir of full age*, prout per quendam inquisit' compert' est, &c. by reason whereof the queen seised the said manor as well as other the manors, &c. and for that the queen was to restore the same tam integre, &c. as they came to her hands the judges were commanded to surcease domina regina inconsulta. It was resolved that this writ, being in nature of an aid prayer, it could not extend to any manors  
not

not found in the office. 9 Rep. 15. Hill. 28 Eliz. Beddingfield's case.

(F) In what Cases Aid shall be granted, where both claim from the King.

[ 1. ] If it appears by the plea of him that prays in aid that the grant of the thing in demand is void, he shall not have aid of the king. 11 Hen. 4. 87.] If it appears to the court, that the letters patents,

or other causes of aid prayer are void, against law, or insufficient in law, no aid shall be granted; for the law will not suffer those things to be aided or maintained by the countenance of law, which appear to the court to be void, against law, or insufficient; ubi lex aliquem cogit ostendere causam, necesse est quod causa sit justa & legitima. 2 Inst. 269.—See (E) pl. 5.

If reversion after the death of tenant for life escheats to the king by attainder of him in reversion, and the king grants it to A. and the heirs male of his body, and that if the land be evicted from him, that he shall render in value, and after the patentee is impleaded and prays aid of the king, the demandant counterpleads it, because the heir of the attainted was restored mesne, between the attainder and the grant of the king, by parliament, and therefore the grant void; and yet the aid was granted by judgment; for the grant of the king shall not be defeated without making the king a party. And it seems supra that the king shall not render in value without clause of recompence ut supra. Br. Counterplea de Aid, pl. 31. cites 39 E. 3. 12.

[ 2. As if the king leases for life, and after charges the land leased, which is void, if the chargee brings an action the lessee shall not have aid, because the charge is void. 11 Hen. 4. 87.] [ 173 ]

[ 3. So if the king grants a fee-farm to one, and after grants an office, part thereof to another, the first grantee shall not have aid. 11 Hen. 4. 87.] Fol. 151.

Br. Aid del Roy, pl. 33. cites 11 H. 4. 86. The first grant was to the mayor and sheriffs of London, to hold the city of London in fee-farm rendering rent, &c. and the after grant was to the plaintiff of the office of measurer of clothes, &c. in the said city, bought and sold there, &c. for his life, he taking so much. The mayor, &c. pleaded the grant as aforesaid, and that by this office their fee-farm would be impaired, and prayed aid of the king; but because the reversion was in the king, therefore the aid shall not be granted of the king; for this should make him to be party to destroy his own right. Contra if the king had aliened it in fee, and had reserved no right. And so it seems that if the king had granted it in fee rendering rent, yet they shall not have aid by reason of the reservation thereof. And Brooke says that so it seems that if the king had granted it in fee rendering rent, yet they should not have aid by reason of the reservation thereof.—Fitzh. Aid de Roy, pl. 46. cites S. C.

[ 4. In trespass, if the plaintiff claims by lease for years from the king, and prays in aid, and the defendant shews a prior lease to him by the king before for life, and confirmed by act of parliament, the plaintiff shall be ousted of aid. Dubitatur. 11 Hen. 6. 28. b.]

5. The Earl of Kent sued by petition to the king, because king Edward the 2d gave to his father 50l. rent out of the vill of A. in tail, and died, his heir now plaintiff within age, and yet within age and in custodia regis by the non-age of the plaintiff, and that the king has granted this rent to J. M. in fee, and prayed restitution, and that the patent be repealed. And J. M. upon scire facias awarded upon this petition indorsed to the chancellor of this matter, came and said, that the king granted this rent to him in recompence of a promotion, &c. and granted that if he be ousted that he will make it good in value, and that this rent came to the king by the attainder of R. so held he by charter of the king, and prayed aid of the king, and

and had it, though this suit be to repeal the patent; and the reason was, because it is *in lieu of voucher* by reason of these words to make it good in value, and a man cannot vouch the king; quod nota; and after came procedendo. Br. Aid del Roy, pl. 41. cites 21 E. 3. 47.

6. *Affise of an office*, and made his *plaint by the grant of the king by his letters patents*, and the defendant *shewed the grant of the other king of the same office*, and prayed aid of the king, and had it by award, notwithstanding that both claimed by the king, and yet *there was no warranty nor recompence* in the patent, and they shall not have the office but for life, as it seems by the case there. Br. Aid del Roy, pl. 93. cites 2 H. 7. 11.

### (G) To whom.

Br. Aid del Roy, pl. 33. cites S. C. accordingly.—  
Fitzh. Aid de Roy, pl. 46. cites S. C.—

See (F) pl. 3. and the note there.

[ 1. **T**HE *fee-farmer of a city* shall not have aid of the king, *where the question is between him and another officer* for life of the grant of the king within the city, which of them shall have the office, because the inheritance of the office is to the king, and therefore the farmer shall not have aid of the king to destroy the inheritance of the king. 11 Hen. 4. 87.]

[ 174 ]  
Fitzh. Aid de Roy, pl. 46. cites S. C.—

Br. Aid del Roy, pl. 3. cites S. C. which see at (F) pl. 3. in the note there.

[ 2. But *otherwise* it had been if the king had granted the inheritance of the office reserving no right, for there the farmer should have aid. 11 Hen. 4. 87. But Brooke in abridging this Aid del Roy 33. seems contra.]

[ 3. If the *patentee in tail* of the king brings an *action* against another for holding a court within a town, and prescribes that there hath not been any other court besides his court in the same town time out of mind, &c. and the defendant says that he has always had such court, paying rent to the king, which court is also granted in tail to the plaintiff, yet he shall not have aid of the king, because it will be more beneficial for the king, when the reversion falls, without this new rent and court. 13 Hen. 4. 11. b.]

See (I) pl. 12. S. C.

[ 4. If the king leases for life, and grants the reversion to another, if the *reversioner* brings waste, or avows for rent, the lessee shall not have aid of him. 13 Hen. 4. 11. b.]

[ 5. If the king grants a town to *fee-farm*, rendering rent, and after another demands certain lands within the town by force of a former grant of the king, the fee-farmer shall have aid of the king. 46 Aff. 1. agrees, because if this be evicted, the recoveror shall be tenant to the king without his lien, (and it seems the rent shall be apportioned.) ]

See (C) pl. 4. S. C.

[ 6. So if another demands common out of certain lands within the town by force of a former grant of the king, the fee-farmer shall have



have aid of the king, because *perhaps the king had a release or other discharge before the second grant.* Dubitatur 46 Aff. 1.]

(H) *Who shall have Aid. In respect of his Estate.*

[ 1. *A Fee-farmer of the king, rendering rent shall have aid.* \* 45 Edw. 3. 3. 46 Edw. 3. 28. b. † 49 Edw. 3. 6. b. † 18 Hen. 6. 12. adjudged. ¶ 43 Aff. 2. Curia. 13 Hen. 4. Aid del Roy 99. ¶ 7 H. 4. 2. b. it seems they were fee-farmers.]

\* Br. Aid del Roy, pl. 16. cites S. C. by reason that the king

may be at a loss.—† Ibid. pl. 20. cites 49 E. 3. 6. S. P. before issue joined, and it was for him who had fee-simple, by reason that the king should be at a loss for his fee-farm if it should be diminished; quod nota.—Fitzh. Aid de Roy, pl. 60. cites S. C.

† Fitzh. Aid de Roy, pl. 19. cites Trin. 18 H. 6. 11. S. C.

¶ S. P. Br. Aid de Roy, pl. 89. cites S. C.

¶ S. P. Br. Aid de Roy, pl. 24. cites 7 H. 4. 2.—Fitzh. Aid de Roy, pl. 92. cites S. C.—S. P. admitted accordingly. Br. Aid del Roy, pl. 11. cites 33 H. 6. 6.

[ 2. *The king's very tenant, rendering rent, shall have aid of the king.* \* 21 E. 3. 19. Admitted † 25 Aff. 8.]

\* Fitzh. Aid de Roy, pl. 2. cites S. C.

† Br. Aid del Roy, pl. 75. cites S. C. but nothing appears there of any tenant rendering rent.

[ 3. *The very tenant of the king by his patent shall have aid of the king.* 45 E. 3. 3. 2 Hen. 4. 22. b. 24. b. *Where nothing is reserved,* \* 18 Hen. 6. 13. † 43 Aff. 6. Curia.]

\* Fitzh. Aid del Roy, pl. 19. cites S. C.—

† Br. Aid del Roy, pl. 90. (89) cites S. C.—Fitzh. Aid de Roy, pl. 94. cites S. C.

[ 4. *In a scire facias against the alienee of the king to repeal his patent, he shall have aid of the king.* \* 8 H. 4. 22. † 33 Aff. 10. adjudged.]

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\* This sci. fa. was

brought against the heir of the alienee, who prayed aid of the king by reason of the gift made to his father, and had it, ex assensu patris in avoidance of delay. But Brooke says, quære if de necessitate legis, for it does not appear if a rent was reserved, nor other cause. Br. Aid del Roy, pl. 83. cites S. C.—Br. Petition, pl. 46. cites S. C. and says that the aid was granted by consent.—Br. Scire Facias, pl. 66. cites 8 H. 4. 21. S. C.—Fitzh. Scire Facias, pl. 61. cites S. C.

[ 5. *He that claims as feoffee of the king, shall not have aid.* \* 8 Hen. 4. 14. b. it seems this is, because *nothing passed* by the feoffment. 3 Hen. 6. 6. because the feoffee is a disseisor.]

\* Fitzh. Aid del Roy, pl. 41. cites S. C.

[ 6. *An intruder upon the king shall not have aid.* 3 H. 6. 5. b.]

Fol. 152.

[ 7. *If the king's tenant dies, his heir within age, if a stranger enters in the right of the king, he shall have aid if he be impleaded, because his entry is in the right of the king.* 4 Hen. 6. 12. b.]

Br. Aid del Roy, pl. 57. cites S. C.

& S. P. though the entry was without any authority.—Fitzh. Aid de Roy, pl. 11. cites S. C. & S. P. though there was no privity.

[ 8. *An abbot of the king's foundation shall have aid of him.* 6 Hen. 4. 5. b. in an action *where he is charged as abbot.*]

Aid of a common person (Y)

pl. 1. S. C.—Fitzh. Counterplea del Aid, pl. 13. cites S. C.

[ 9. *But it is otherwise if he is charged as parson appropriate.* 6 Hen. 4. 5. b.]

Aid of a common person (Y) pl. 2.

pl. 2. S. C.—*Fitzh. Countersplein del Aid*, pl. 13. cites S. C. accordingly; for by *Huls*, 2 *Wals* shall not have aid but of the thing in demand, or of the thing out of which the thing demanded is issuing, and the annuity is not issuing out of the abbey; and thereupon *Thurn* bid them have aid of the patron and ordinary, &c.

S. P. Br. [10. In an assise of a corody against the *lessee of the king, rendering rent*, with a clause that the lessee shall bear his charges, the lessee shall not have aid of the king. 31 Ass. 27. adjudged.]  
*Aid del Roy*, pl. 82. cites S. C.—*Fitzh. Aid de Roy*, pl. 93. cites S. C.—8. C. cited Arg. Roll Rep. 208. because the king shall have damage by it.

\* *Fitzh. Aid de Roy*, pl. 10. cites [11. *Tenant at will* shall have aid of the king. \* 4 Hen. 6. 11. b. † 21 Hen. 6. 36. b. 17 Edw. 3. 17. b.]  
 S. C.—Br. *Aid del Roy*, pl. 56. cites S. C.—S. C. cited 4 Rep. 21. b.  
 † Br. *Aid del Roy*, pl. 46. cites S. C.—Br. *Aid*, pl. 82. cites S. C.—*Fitzh. Aid de Roy*, pl. 22. cites S. C.—See (U) pl. 2. S. C.—S. C. cited 4 Rep. 21. b.

\* S. P. and per cur. he [12. *Tenant by copy of court roll* according to the custom, shall have aid of the king lord of the manor. \* 15 Hen. 7. 10. Curia. Dubitatur. † 21 Hen. 6. 37.]  
 shall conclude judgment if roge inconfulto. Br. *Aid del Roy*, pl. 49. cites S. C.—*Fitzh. Aid de Roy*, pl. 98. cites S. C.—4 Rep. 22. a. cites S. C.  
 † Br. *Aid del Roy*, pl. 46. cites S. C.—Br. *Aid*, pl. 82. cites S. C.—*Fitzh. Aid de Roy*, pl. 22. cites S. C.—(U) pl. 2. S. C.—4 Rep. 21. b. cites S. C.—Br. *Aid del Roy*, pl. 1. cites 27 H. 8. 28. S. P. accordingly.

[13. *Tenant after possibility of issue extinct*, shall have aid of the king in reversion. 11 Hen. 4. 71. b.]

Br. *Aid del Roy*, pl. 84. cites S. C.— [14. If the king seises land by office for the wardship of J. S. and leases this to another during the non-age, and after upon a petition by W. H. to the king, who was ousted of the land by the king, a verdict is found for him, and he thereupon sues a scire facias against the patentee, he shall have aid of the king. 37 Ass. 11. adjudged.]

Br. *Petition*, pl. 17. cites S. C.—Br. *Aid del Roy*, pl. 50. cites S. C.—See (D) pl. 3. S. C.

Br. *Gard*, pl. 28. cites S. C.— [15. If the king's committee of a ward be impleaded for this, he shall have aid of the king, for the king continues guardian, and therefore the right of the king shall not be put to trial without the king. 12 Hen. 4. 25. Curia.]

*Fitzh. Gard*, pl. 81. cites S. C.—In [16. If the king has committed a ward over, and a stranger takes the ward by tort against whom a right of ward is brought by another stranger, he shall have aid of the king, because he hath in a manner the estate of the grantee. 12 Hen. 4. 25. adjudged.]

as committee of the king by a ward during the non-age of an heir, and prayed aid of the king, and was ousted by award, for the aid shall not be granted but where the king shall render in value, or where it shall be to his prejudice, and here is neither the one nor the other; for nothing shall be recovered but damages, nor shall the king be estopped; for he is a stranger to the recovery, and the right of the ward shall not come in debate here, but contra if it was in writ of ward, dower, or præcipe quod reddat. Br. *Aid del Roy*, pl. 104. cites 22 E. 4. 20.

\* S. P. and if a man enters it is an intrusion upon the possession of the king. [17. So the grantee of the ward of the king shall have aid of the king, for the king continues guardian and in possession. \* 4 Hen. 6. 11, 12. b. for he shall sue livery. † 9 H. 6. 21. b. 29 Ass. 5. Dubitatur, where no rent is reserved. 19 E. 3. *Aid del Roy*, 64.]  
 Br. *Aid del Roy*, pl. 55. cites 4 H. 6. 10.

† S. P.

† S. P. Br. Aid del Roy, pl. 4. cites 9 H. 6. 20. — And it seems that there is no difference between a committee and grantee, and grantee of the grantee. See Br. Aid del Roy, pl. 4. cites 12 H. 4. 18.

[18, So for the same reason the grantee of the king's grantee of a ward shall have aid of the king. 39 Edw. 3. 8.] S. P. Br. Aid del Roy, pl. 4. cites 9 H. 6. 20. if he has his intire estate. — See the notes on pl. 17.

[19. So if the grantee of the ward upon which no rent was reserved, be sued in trespass after the full age of the infant, he shall not have aid of the king, because it was without rent, and is determined. 9 Hen. 6. 62. adjudged.] But it was held, that if rent had been reserved, that he should.

have aid of the king as well after livery as before; for it was agreed, that collector of tenths or fifteenths shall have aid of the king after that the king is satisfied. Br. Aid del Roy, pl. 7. cites S. C. — Fitzh. Counterplea del Aid, pl. 9. cites Hill. 9 H. 6. 61. — S. P. Arg. Roll Rep. 292.

20. In assise of rent, the ter-tenant said, that king Edward the 3d, by charter gave to W. and his heirs in fee, which estate the tenant has, and demanded judgment rege inconsulto, &c. and had aid, notwithstanding that he did not shew How he had the estate of W. But in such case Shard was of a contrary opinion; therefore quære; for it does not appear that it is for feebleness of the estate, nor that the king is to be damnified; for it is not supposed that he held of the king by rent, nor does it appear whether the title of the king be before the title of the plaintiff or after. Br. Aid del Roy, pl. 79. cites 29 Aff. 39.

21. Assise of rent against ter-tenant, who pleaded hors de son fee, the plaintiff made title to a rent-charge, the tenant said that the land is held in chief of the king, and prayed aid of the king, and had it, and after procedendo was granted; for the tenant of the king may charge without licence. Br. Aid del Roy, pl. 86. cites 40 Aff. 5.

22. Tenant for life who has franktenement shall not have aid of the king, nor of a common person. Br. Forcible Entry, pl. 6. cites 22 H. 6. 17. by the best opinion.

23. In assise the tenant said that king Edward the 3d gave to his predecessor in Frankalmoigne, and prayed aid of the king. Quære; for it is said there, that none shall have aid of the king if he has not warranty, or be within the case of the \*statute de Bigamis, or where the king is to be at a loss, as where a rent is reserved, as upon a fee-farm, &c. with rent reserved, and this case is none of them. Br. Aid del Roy, pl. 11. cites 33 H. 6. 6. [ 177 ]

\* See pl. 28.

24. In trespass the defendant said that he is seised of an acre in fee, and holds of the king, and has common in the same place appendant to this acre, and prayed aid of the king; & non allocatur; for the king shall not be at loss. Br. Aid del Roy, pl. 63. cites 37 H. 6. 28.

25. In assise of rent the tenant said that he held the land, out of which the rent arose of the king, and prayed aid of the king. He shall not have it; quod nota, by the opinion of the court. Br. Aid del Roy, pl. 63. cites 37 H. 6. 28.

26. If a man has charter of the king of the gift of the thing in demand, there either for salvation of the reversion of the king, or of his

\* Br. Aid del Roy, pl. 55. cites 4 H. 6. 10.

his title, or \* for feebleness of the estate of the tenant, or if the king is to take any detriment or loss, in these cases the tenant shall have aid of the king. Br. Aid del Roy, pl. 94. cites 2 H. 7. 7. by the Reporter.

[\* Quere if those words (of the king) should not be omitted, and they

27. *Formedon in remainder.* The tenant vouched to warranty the queen and her sisters, as heirs of the Duke of York. Per Hawes J. he shall have the voucher, and aid \* of the king together; for the queen is a person exempted, and a sole person by the common law. Br. Aid del Roy, pl. 96. (95) cites 3 H. 7. 14.

are not in the year-book; for it seems a man cannot vouch the king; for that is to sue the king by action, which cannot be, &c.]

By this branch, if the king gives lands with clause of an express warranty, yet the patentee, &c. shall not have or re-

28. 4 E. 1. stat. 3. cap. 1. *Concerning pleas, where the tenant excepteth, that he cannot answer without the king, it is agreed by the justices, and other learned men of our lord the king's council of the realm, which heretofore have had the use and practice of judgments, that where a feoffment was made by the king with a deed thereupon, that if another person by a like feoffment and like deed, be bounden to warranty, the justices could not heretofore have proceeded any further,*

cover in value against the king, without special words that the king shall yield lands in value upon eviction, &c. and nevertheless, in that case he shall have aid of the king by the general purview of this law; for it is for the honour of the king, that he aid the patentee with any record or evidence that he hath, for maintenance of the estate which he hath granted and warranted to him; but if the king exchanges lands with another, by this warranty in law the king is bound to warranty, and to yield in value, and so it was adjudged Hill. 6 E. 1. in C. B. Rot. 2. William Brewie's case, Wallia. 2 Inst. 268. 269.

If the king gives lands to one in fee by the word *Dedi*, this bindeth not the king to warranty, and yet the patentee shall have aid of the king by the letter of this branch, because in that case another person should be bound to warranty by this word *Dedi*; and so it is, albeit the tenure by the patent is *so bold of the chief lords*. 2 Inst. 269.

This command is by the king's

*Neither yet do proceed without the king's commandment had therefore, neither can it be thought that they may proceed.*

writ of *procedendo*, whereof there be 2 sorts, viz. *in loquela*, and *ad iudicium*; for the king's commandments in judicial proceedings are ever by writ, according to the course of the common law, whereof you may read in the Register, F. N. B. and our books. 2 Inst. 269.

Here are 3 cases where aid, &c. ought not

29. 4 E. 1. stat. 3. cap. 2. *And it seemeth also, that they could not proceed in certain cases, As where the king hath confirmed or ratified any man's deeds to the use of another;*

to be granted of the king, nor the court surcease by force of a writ de domino rege inconsulto, whereof the first is, (when the king confirms or ratifies, &c.) which must be so

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understood when the confirmation gives no estate, and if it gives any estate, where no rent or service is reserved; or where in like case (as has been said) another person were not bound to warranty; but if a rent or service be reserved, and by the action brought (if the

demandant prevail) the rent or service should be defeated, then there is good cause of aid-prayer, &c. Or if a common person were in that case bound to warranty, then is the confirmation in nature of a feoffment, and within cap. 1. What hath been said in case of confirmation, the same holdeth in case of release. 2 Inst. 270.

In *formedon* the tenant said that he held the land demanded by grant of the king, and shewed charter of it, and prayed aid of the king, and had it, &c. *Quod mirum*, without shewing rent reserved to the king, or warranty or reversion. Quere if it was not by this word *Dedimus*. Br. Aid del Roy, pl. 22. cites 2 H. 4. 19.

Here is the 2d case

*Or hath granted any thing as much as in him is;*

where no aid ought to be granted; for the king granteth but his own estate without any warranty. 2 Inst. 270.

In assise of the office of keeper and janitor of Woodstock-Park, of the grant of the king for life, the defendant made title by a former grant by king E. 4. by the word *Concessimus*, and prayed aid of the king, but the justices denied it. But the Reporter held, that he should have aid by the words of the statute as above, and that the word (*Concessimus*) has the same force as \* *Dedimus & Concessimus*; for that the statute shall be taken *disjunctive*, and not *copulative*. Br. Garranties, pl. 53. cites 2 H. 7. 7. But Brooke says that it is not so; for the statute of bigamis is *dedimus & concessimus*.—Br. Aid del Roy, pl. 94. cites S. C.

\* 4 E. 1. cap. 6.

Or where a deed is shewed, and clause contained therein, whereby *This is the 3d case where no*  
 be ought to warrantize;  
 aid shall be granted in case of a restitution. 2 Inst. 270. —But in 2 Inst. 270. Ld. Coke has these further words, as contained in the statute, viz. (*quod rex tenementum aliquod reddiderit, nec clausula, &c.*)

And in like cases they shall not surcease by occasion of a confirmation, Here some  
 grant, or surrender, or other like; but after advertisement made thereof have sup-  
 to the king, they shall proceed without delay. posed that  
 in these 3  
 cases aid should be granted, but by force of these words (that no search should be granted,) wherein  
 2 errors be committed, 1st, That aid should be granted, which is against the express letter of the  
 statute, *Non erit supersedendum, &c.* and against the book of 39 E. 3. 2dly, That in case of aid-  
 prayer of the king, or of the writ de domino rege inconsulto, no search ought to be granted, but  
 only in a petition of right. 2 Inst. 270.

And if aid had been in any of these 3 cases erroneously granted, the tenant or defendant should have a *procedendo sine dilacione*; that is, without delay and of course. 2 Inst. 270.

## (I) In respect of the Estate of the King.

[ 1. ] If the heir of the lessor for years be in ward of the king for S. P. be-  
 other land, and not for this, the lessee shall not have aid of cause he did  
 the king. 2 Hen. 4. 10. b.] not say that  
 this land  
 was seised into the hands of the king, and descended; for an infant in ward of the king may have  
 land by purchase, wherefore the defendant prayed in aid of the heir, and not of the king. Quod  
 nota. Br. Aid del Roy, pl. 21. cites S. C.—Fitzh. Aid de Roy, pl. 38. cites S. C.

[ 2. But if that be seised in ward, he shall have aid of the king. \* Br. Aid  
 \* 2 H. 4. 10. b. † 10 H. 4. 6. adjudged.] del Roy, pl.  
 21. cites  
 S. C.—Fitzh. Aid de Roy, pl. 38. cites S. C.

† In assise against tenant in dower, where the heir was in ward of the king, she prayed aid of  
 the king. The assise was adjourned, and afterwards the aid was granted by all the court without  
 difficulty, &c. Fitzh. Aid de Roy, pl. 110. cites S. C.

[ 3. If a man leases for life rendering rent, and after the reversion [ 179 ]  
 comes to the king, the lessee, if he be impleaded, shall have aid of the Fitzh. Aid  
 king; for by this suit the rent of the king may be destroyed. 31 del Roy, pl.  
 Aff. 2. 3 E. 3, Fitz. Aid del Roy 68.] 77. cites  
 S. C.

[ 4. Aid shall be granted of the king for a reversion escheated to Fitzh. Aid  
 him. 4 H. 4. pl. 19.] de Roy, pl.  
 96. cites 4  
 H. 4. 5. S. P.

[ 5. If there be lessee for life, the remainder in tail, the remainder  
 in fee (\*) and both in remainder are attainted of treason, the lessee  
 shall have aid of the king. 7 H. 4. 18. b. and if only the remainder  
 in fee had been attainted, he should have had aid of the remainder  
 in tail and the king. 7 Hen. 4. 18. b.]

\* Fol. 153.

Br. Aid  
 del Roy, pl.  
 27. cites  
 S. C. &  
 S. P.

S. P. for the right of the king cannot be tried without making him a party. But in such case he shall have aid of the remainder in tail first.—Br. Prerogative le Roy, pl. 80. cites S. C. accordingly; for it is to the king's advantage.

[ 6. If there be *lessee for life*, the remainder to a priory of the foundation of the king, if there be no prioress the lessee shall have aid of the king, for the right is to the king till there is a prioress. 32 Edw. 3. Aid 39. adjudged.]

\* Br. Aid del Roy, pl. 92. (91) cites S. C. —S. P. Arg. Roll Rep. 291. cites 14 E. 3. 1. 8 H. 6.

[ 7. If in an action the tenant be seised in fee, and acknowledges in court that he is tenant for life, the reversion or remainder to the king, he shall have aid of the king, because the king shall have the reversion by estoppel against him by this acknowledgment of record, \* 1 Hen. 7. 29. † 8 Hen. 4. 14. b. ‡ 11 H. 4. 85. b. ¶ 8 Hen. 6. 24.]

25. 1 H. 7. 28.—Fitzh. Aid de Roy, pl. 32. cites 1 H. 7. 28.

† Br. Estoppel, pl. 203. cites S. C. but says nothing of aid.

‡ Br. Counterplea de Aid, pl. 25. cites S. C. but S. P. does not clearly appear.—Fitzh. Counterplea de Aid, pl. 16. cites S. C. & S. P.

|| In *formedon* the tenant said, that King Henry the 4th leased to him for life, and the reversion is descended to the king, and prayed aid of him, and could not have it without shewing lease by patent in casu regis, by which he said that he held for term of life, the reversion to the king, and prayed aid of him, and had it, the reason seems to be in as much as now the reversion is in the king by conclusion though he had no reversion before. Br. Aid del Roy, pl. 43. cites 8 H. 6. 25.—Br. Monstrans de Fais, pl. 52. cites S. C. accordingly.

[ 8. If the king seises generally the possessions of an abbot in an action against the abbot he shall have aid. 11 Hen. 6. 10. 35. b.]

S. P. and assise was sued forth, because it

[ 9. But if they are seised for dilapidation, he shall not have aid, because this is his own act, and his default, and it appears to the court. 11 Hen. 6. 35. b. But quære this.]

did not appear that the king ever seised this land and the interest of the abbot was not but a chattel, and the land was not the land of the possession of the abbot, and so the aid is not necessary, and also it is not usual to grant aid upon such manner of protection for goods upon dilapidations; for this is not sufficient cause to grant protection in delay of the right. Br. Aid del Roy, pl. 106. cites 11 H. 6. 12.

Br. Aid del Roy, pl. 106. cites 11 H. 6. 12.

[ 10. If the king takes into his protection the goods and possessions of an abbot without cause, the abbot shall not have aid of the king if he be impleaded, for the king cannot delay any without cause, 11 Hen. 10.]

S. P. Br. Aid del Roy, pl. 106. cites 11 H. 6. 12.

[ 11. But otherwise it is if he takes it into his protection for good cause, as for that he is in his service in the wars. 11 Hen. 6. 10.]

See (G) pl.

4. S. C.—

Arg. Roll

Rep. 291.

cites 21 E.

3. 24. that

in such case a suit was stayed by writ of *circumspecte agatis*.

[ 12. If the king leases for life, and grants the reversion to another, it seems the lessee shall not have aid after of the king if he be impleaded by a stranger, for the king cannot be at any prejudice. Contra 13 Hen. 4. 11. b.]

[ 180 ]

[ 13. If the king seises the land of a prior alien, and leases this to farm, rendering rent, and after grants the rent over, yet the farmer shall have aid of the king. (It seems the king had the reversion to himself.) 13 H. 4. 11. b.]

See (D) pl.

3. S. C.—

Br. Aid del

Roy, pl. 6,

[ 14. If the king grants an advowson with warranty, in a quære impedit against the grantee and his presentee, the grantee shall have aid of the king in nature of a voucher, the incumbent shall have aid also



also of the king, because if it be tried against him, it will be evidence against the king. 9 Hen. 6. 57. b.] cites 9 H. 6. 56.—A man shall

have aid of the king for recompence in lieu of voucher, and sometimes in lieu of writ of warrantia chartæ; for voucher does not lie against the king. Br. Prerogative, pl. 146. cites 9 H. 6. 56.—Br. Voucher, pl. 7. cites S. C.—Br. Quare Impedit, pl. 7. cites S. C.—Fitzh. Aid de Roy, pl. 15. cites S. C.

15. In assise the tenant answered as tenant by guardian, and shewed charter of the king of the gift to his father in tail, the reversion to the king, and shewed writ of the king, testifying that he had seised for the non-age, commanding that they should not proceed to the assise, rege inconsulto, wherefore it was awarded that he sue to the king. Br. Aid del Roy, pl. 73. cites 22 Ass. 24.

16. In scire facias to execute a fine, the tenant said that he held the manor of the lease and grant of the king for term of life, the reversion to the king, and prayed aid of him; and by Wilby, he ought to shew deed of the lease; for where a man says that he holds for life, the reversion to the king, there, notwithstanding that he had fee-simple before, the king shall have the reversion by the aid-prayer, and yet the plaintiff shall not be delayed without shewing deed of the lease. But per Greene & Thorpe, the aid is well grantable without shewing deed; but he shall not recover in value without shewing deed. Contra per Shard. But after writ of Chancery came, testifying, &c. and therefore he had aid, &c. and after came procedendo, and the tenant pleaded in chief. Br. Aid del Roy, pl. 48. cites 24 E. 3. 1.

17. In assise, the tenant shewed how this land for certain cause was seised into the hands of the king, and after the king by his charter rehearsing how by the assent of the dukes, earls, &c. the defendant was attainted, he restored him as well in person as in land and tenement, and annulled and set aside the cause of the seiser, and that writ was sent to the sheriff to seize these tenements, and to deliver them to the tenant, which he did accordingly, and after the king in parliament, anno 26, rehearsed the said restitution, and ratified and confirmed his estate, and demanded judgment rege inconsulto, and he was ousted of the aid of the king by award; for he is remitted to his ancient estate, and has nothing of the gift of the king. Br. Aid del Roy, pl. 77. cites 28 Ass. 19.

18. In formedon the tenant said that he held the land demanded by grant of the king, and shewed charter of it, and prayed aid of the king, and had it. Quod mirum, without shewing rent reserved to the king, or warranty or reversion. Quære if it was not by this word Dedimus. Br. Aid del Roy, pl. 22. cites 2 H. 4. 19.

19. Formedon against T. and E. his feme, who said that the king had given him and his feme, and prayed aid of the king; per Read, this cannot extend to E. and also the charter is of the fee without any thing reserved to the king; judgment if the aid; and for E. it was said, that she was his feme, and by this name the king had granted to her, &c. viz. by name of feme, as it seems, and not by name of E. feme, &c. by which she shall have aid, quod mirum! where the king had no reversion nor rent reserved, nor made warranty with recompence. Br. Aid del Roy, pl. 23. cites 2 H. 4. 25.

20. In dower of the third part of 20l. rent, the tenant said that rent is issuing out of the manor of H. which is seised into the king's hands by non-age of the heir, and demands judgment if rege inconsulto, &c. And it was agreed that he shall not have aid upon this matter, without ascertaining the court of this matter by record; whereupon a baron of the Exchequer brought the record in his hand testifying the same, and thereupon he sued to the king. Br. Aid del Roy, pl. 31. cites 11 H. 4. 39.

21. If a man prays aid of the king by reason of the reversion, the demandant shall not have counterplea; per Hank. because it is of the king, quære & concordat 24 E. 3. 23. if a deed or record be shewn proving it, and contra if no such thing be shewn; quod nota, the reason seems to be because the counterplea shall be in the Chancery. Br. Counterple de Aid, pl. 25. cites 11 H. 4. 85.

For it was said that where the king grants for life, and he [the grantee for life] leases

22. In trespass, the defendant made consufance for rent arrear because the tenant held of the king as of the honour of B. which was assigned to the queen in dower, by which for so much arrear, &c. and prayed aid of the queen and of the king by reason of the reversion, and had it of the queen after issue, and was ousted of the king. Br. Aid, pl. 13. cites 28 H. 6. 13.

for years, the lessee for years shall not have aid of the grantee for life, and of the king, by reason of the reversion, but of his lessor only; but it is said that after the jointure they may pray aid over; but it was said that this shall be after issue; for a man shall not have aid of the queen, nor of other common person before issue joined in writ of trespass, and shall have process against the queen as against a common person, but a man shall not have aid of the king, but where he is bailiff or servant to the king immediately. Br. Aid, pl. 13. cites S. C.

\* Br. Aid del Roy, pl. 9. cites S. C. and S. P.

23. Where the king makes a corporation absque aliquo reddendo, the aid shall not be granted. Per Keble. Br. Aid del Roy, pl. 93. cites 2 H. 7. 11.

\* Br. Aid del Roy, pl. 9. cites 28 H. 6. 13.

24. In *præcipe quod reddat*, the tenant may have aid of the queen and also of the king, where he is tenant for life, the reversion to the queen, and this without shewing deed as assignee. Per Townsend, he shall vouch first the queen, and then he shall have aid of the king; but by Hawes, he shall first have aid of the king, and after of the queen, and \* not of both together. Br. Aid del Roy, pl. 96. cites 3 H. 7. 14.

25. In *quare impedit*, the defendant said that certain persons were enfeoffed in fee to the use of himself for his life of the manor to which the advowson was appendant, and after his decease to the use of the king, and prayed aid of the king, and was ousted of the aid; for the king cannot have it but by matter of record, and cannot have feoffees to his use, nor is the use any thing [in possession at] common law. Br. Aid del Roy, pl. 66. cites 21 H. 7. 21.

S. C. cited Mo. 421. in pl. 583. and as to aid of the king in reversion after entail

26. A writ of rege inconsulto came out of Chancery, reciting that the king had a reversion after divers estates tail, and because it was a remote possibility, it was disallowed. Roll Rep. 289. Arg. cites Hill. 18 Eliz. Rot. 157. in ejectment by BLOFIELD v. LESSEE OF THE EARL OF KENT, and that Mich. 33 & 34 Eliz. between the same parties such writ was allowed, because an immediate

*mediate estate tail dependant on an estate for life* was recited by the writ to be in the king. where there are mesne remainders in tail, cites and refers to 34 E. 3. 24. 10 H. 7. 19. Fitzh. Bar. 154. and Saver Default 37. and 21 E. 3. 44.

(K) *Who shall have Aid in respect of Privy.* [ 182 ]  
*For Default of Privy, [and who shall be said Privy]* pl. 10, 11, 12, 13, 14.

[ 1. ] *If a man justifies a thing as bailiff and servant to the king's grantee of a ward, he shall not have aid of the king, because he is not privy to the king.* 3 Hen. 6. 34. \* 4 Hen. 6. 12. S. P. For he is a stranger to the patent, and no mischief, for he may  
*The same law if a rent had been reserved upon the grant.* Contra 3 Hen. 6. 34.]  
 have aid of his master in whom there is privy, and he shall have aid over of the king; quod nota. Br. Aid del Roy, pl. 57. cites S. C.—\* Fitzh. Aid de Roy, pl. 11. cites S. C. and Martin admitted that the case put that if a stranger enters into the land in the right of the king after death of the tenant, he shall have aid if he be impleaded, but said, that in the principal case he shall not, for in the case put he shows that his entry is immediate in the right of the king, and no estate mesne between the king and him, whereas here he shews a mesne estate, though it be in right of the king, and so was the opinion of the court.

[ 2. In an assise, if the bailiff says, that a lease was made to his master for life, and the remainder to the king in fee, he shall not have aid of the king for default of privy. \* 8 Hen. 7. 11. Aid is granted, but after said that it ought not. † 1 Ass. 1. ] Br. Aid del Roy, pl. (97.) 98. cites S. C. that aid was granted.  
 ed, but says, it seems that it should not be granted upon the plea of the plaintiff.—Fitzh. Aid de Roy, pl. 35. cites S. C. accordingly.—See (X) pl. 1. 2.  
 † Br. Aid del Roy, pl. 69. cites S. C. accordingly.—\* Br. Baillie, pl. 11. cites S. C. that bailiff in assise shall not have aid; for the bailiff cannot stay the assise; contra where the tenant pleads good matter for aid by attorney.—Fitzh. Aid de Roy, pl. 86. cites S. C.

[ 3. In trespass, if the defendant justifies the entry as servant to the lessee for life of the king, he shall not have aid of the king, because he is not privy to the lease. 4 Hen. 6. 12. ]

[ 4. So if a man in replevin avows as bailiff to the lessee of the king he shall not have aid, because he is a stranger to the lease. 9 Hen. 6. 26. b. ] S. P. But he shall have aid of his master,  
 and be over of the king. Br. Aid de Roy, pl. 5. cites S. C.—Fitzh. Aid de Roy, pl. 18. cites S. C.—See pl. 15.

[ 5. So if a man justifies the taking of toll as bailiff of the lessee for years of the king, he shall not have aid of the king for default of privy, but he may have aid of the lessee, and then both of the king. 11 Hen. 6. 39. b. Curia. ] Fol. 154. The defendant as bailiff may  
 have aid of his master, and he over of the king. Br. Aid del Roy, pl. 107. cites S. C. and S. P. accordingly by all the justices.

[ 6. If a man justifies because he is sub-collector of tenths, he shall not have aid, because he is a stranger to the commission. \* 7 H. 6. 27. † 9 Hen. 6. 20. b. 21. b. though the commission gave power to make a sub-collector. ] \* Fitzh. Aid de Roy, pl. 13. cites S. C. but there it is (Collector) instead

instead of (Subcollector.)—† S. P. because he may have aid of the high collector, and he over of the king. Br. Aid del Roy, pl. 4. cites 9 H. 6. 20.—Fitzh. Aid de Roy, pl. 17. cites S. C.—But it was agreed that the *lessee or committee of the king, who has his intire estate*, may have aid of the king; for where the thing is such as may be granted over, there the lessee of the lessee or committee of the king may have aid of the king, if he has his intire estate. But contra of an office

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which cannot be granted over, as collector, judge, justice, &c. who cannot grant their estate over; and notwithstanding the king grants the ward, yet livery shall be sued out of the hands of the king, and for that reason the grantee, or the grantee of the grantee, shall have aid of the king. Br. Aid del Roy, pl. 4. cites S. C.—Ibid. pl. 57. cites 4 H. 6. 12. S. P.

• Fitzh.  
Aid de  
Roy, pl. 13.  
cites S. C.

[ 7. In false imprisonment, if the defendant says that he was taken by certain persons by force of a commission to them directed, and they delivered him to the defendant to keep, &c. he shall not have aid, for he is not privy to the commission. 7 Hen. 6. 37. adjudged. So he shall not have aid in this case, although the commission was *singulis jure fidelibus*. \* 7. H. 6. 27.]

• S. P. Br.  
Aid del  
Roy, pl. 57.  
cites S. C.  
For he is a  
stranger to  
the patent,  
and no

[ 8. In trespass, if the defendant, as bailiff to the sheriff, justifies the taking and sale as a *stray to the use of the king*, he shall not have aid of the king for want of privy. Dubitatur 14 Hen. 6. 5. b. \* But if the king's tenant dies his heir within age, and a stranger enters in the right of the king, he shall have aid, because he enters immediately in the right of the king. 4 H. 6. 12. b.]

mischief; for he shall have aid of his master, in whom there is no privy, and he shall have aid over of the king. Quod nota. Fitzh. Aid de Roy, pl. 11. cites S. C.

• Fitzh.  
Aid de Roy,  
pl. 17. cites  
S. C.—  
Br. Aid del  
Roy, pl. 4.  
cites S. C.

[ 9. If the king leases certain lands to another, and the lessee grants over part of his estate, in an action against him, [scilicet, the grantee] he shall not have aid of the king, because he is not privy to the lease. \* 9 Hen. 6. 21. Curia. Hill. 39 Eliz. B. R. between Merry and Holdeney, adjudged. Contra † 29 Ass. 21.]

† Br. Aid del Roy, pl. 80. cites S. C. accordingly.

S. P. Br.  
Aid del  
Roy, pl. 4.  
cites 9 H. 6.  
20.—  
Fitzh. Aid  
de Roy, pl. 17. cites S. C.

[ 10. But if the king's lessee grants over all his estate, and he [scilicet, the grantee] is impleaded, he shall have aid of the king, because he is privy to the first lease, he having the same estate. 9 H. 6. 21. b.]

[ 11. If the king leases for years, and after endows the queen of the reversion, who confirms to the lessee for life, he may have aid of the king without the queen. 11 H. 6. 39. b.]

Br. Aid, pl.  
13. cites  
S. C. ac-  
cordingly.  
—Br.  
Aid del  
Roy, pl. 9.  
cites S. C.  
—Fitzh.  
Aid de Roy,  
pl. 24. cites  
S. C. accordingly, and says that Mich. 29 H. 6. it was adjudged as here, and that the queen had aid of the king.

[ 12. In trespass for taking his cattle, if the defendant says that the king, and all those whose estate the king hath in the manor of D. have had, time out of mind, &c. 20l. rent out of a place where the taking was, and that the manor of D. was assigned to the queen in dower before the taking, and that he took the distress for rent as bailiff of the queen, he shall not have aid of the king for want of privy, though he shall have it of the queen. 28 Hen. 6. 13. adjudged.]

Fitzh. Aid  
de Roy, pl.  
32, cites

[ 13. When king Edw. 4. leased land or an office for life, and died, and the reversion descended to his daughter, who married Hen. 7. though

though the reversion was in the queen, yet the lessee, being im- S. C. —  
pleaded, might have aid of the king only without the queen. I In *formacion*  
Hen. 7. 29. b. by many justices.] the tenant  
vouched

*the queen and two others as heirs of the Duke of York, and shewed cause by the duke. Brian said the queen is not a person able to be vouched as here: for this is real matter; but in personal causes she is exempt, and has ability as a private person, and may make a gift by lease for term of her life, and therefore by him the tenant shall have first aid of the king, and then of the queen, but \* not of both together. And it was doubted if the queen be a private person exempted by the common law, or by the statute; for if she be by the statute, it ought to be pleaded, per Brian; for it is a private statute. But per Townsend, if she be exempted by the common law, the tenant need not have*

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\* Br. Aid del Roy, pl. 9. cites 28 H. 6. 13. accordingly.

[ 14. If the queen leases to another, and the king confirms it, the lessee shall have aid of the king; for the king is enough privy to this. 15 Edw. 3. Aid del Roy 66. adjudged.]

[ 15. If a man avows as bailiff to the lessee of the king of a seign- Br. Aid del  
ory, and hath aid of the lessee, they both shall have aid of the king. Roy, pl. 5.  
9 Hen. 6. 26. b.] cites S. C.  
and says

that the bailiff prayed aid of the king, but could not have it, because there is no privy, and it is not immediate; but that the bailiff shall have aid of his master, and the master over of the king, — Fitzh. Aid de Roy, pl. 18. cites S. C. according to Br.

16. In trespass, he who justifies by command of the king only, and not as bailiff, sheriff, escheator, &c. shall not have aid of the king, and yet the justification is good by the command of the king. Br. Aid del Roy, pl. 68. cites 39 H. 6. 17.

17. In trespass the defendant said that the king granted the land to the queen for life, who leased to the defendant to hold at will, and prayed aid of the king, and was ousted by award. Br. Aid del Roy, pl. 109. cites 11 H. 7. 7.

D. 258. 2.  
pl. 15. Hill.  
9 Eliz. cites  
S. C. that  
he could  
not have

aid of the king, inasmuch as he was a stranger to the patent, and nothing would be lost to him in this action.

**(L) Who shall have it. The Prayee.**

**Fol. 155.**

[ 1. IF in an ad terminum qui præteriit the tenant hath aid of W. the son and heir of S. who comes and joins, if they say that the king by his patent rehearsed that he had granted this to G. for life, the remainder to the tenant for life, yet they shall not have aid of the king, because this is contrary to his prayer before, by which the reversion was supposed immediately to him who joined himself, 25 Edw. 3. 39. a.]

Fitzh. Aid  
de Roy, pl.  
6. cites  
S. C.

[ 2. But if they say the king granted the reversion to the father of the prayee, they shall have aid of the king. 25 Edw. 3. 39. adjudged.]

Fitzh. Aid  
de Roy, pl.  
6. cites  
S. C.

**(M) Who**

(M) *Who shall have Aid in respect of his Office.*

Fitzh. Aid de Roy, pl. 44. cites S. C. [ 1. ] *If the king's officer makes a contract by force of his office to the use of the king, if he be sued for this he shall have aid of the king, because the king is the debtor.* 11 Hen. 4. 28. b.]  
 Br. Aid del Roy, pl. 29. cites S. C. in case of the clerk of the king's works, who averred that the king had not paid him.

[ 185 ] [ 2. In debt the defendant says he was the *buyer of victuals for the king's household*, and bought of the plaintiff certain, &c. and that the plaintiff took a bill to go to the treasurer for payment, he shall have aid. 3 H. 4. 9. b.]  
 Fitzh. Aid de Roy, pl. 40. cites 3 H. 4. 8. S. C.

Fitzh. Aid de Roy, pl. 40. cites 3 H. 4. 8. S. C. [ 3. But he shall not have aid upon such a plea *in account against him as bailiff of his manor*; for this is no answer to the plaintiff. 3 H. 4. 9. b.]

\* Br. Aid del Roy, pl. 26. cites S. C. [ 4. In debt against a buyer of *victuals*, if he says that he bought to the king's use, he shall have aid. \* 7 Hen. 4. 7. † 11 Hen. 4. 28.]  
 accordingly, though the plaintiff replied he bought it to the use of himself.

† Fitzh. Aid del Roy, pl. 44. cites S. C. and though the moneys are allowed in the Exchequer, yet that does not prove that they are paid, and if they are not paid, he shall have aid.—See (N) pl. 2. S. C.

Br. Aid del Roy, pl. 29. cites S. C. [ 5. So a *purveyor* shall have aid of the king. 11 Hen. 4. 28. if he sued for *victuals taken for the king's household at a price.*]  
 & S. P. agreed; for he may take victuals at a reasonable price for the use of the king, according to the statute, whether the party is willing or not, and this by reason of the commission: but contrary of clerk of the king; for a clerk has no commission, as it seems.—But see now the several statutes made restraining purveyors, by reason whereof aid lies not.

Br. Aid del Roy, pl. 29. cites S. C. [ 6. If the *clerk of the king's works buys certain carriages and loads of gravel, to the use of the king at a price*, in debt against him he shall have aid of the king, though the party was not compellable to sell it him, 11 Hen. 4. 28.]  
 —Fitzh. Aid de Roy, pl. 44. cites S. C.—See pl. 5. in the note there.

\* Fitzh. Aid de Roy, pl. 42. cites S. C. [ 7. A *collector of fifteenths* shall have aid of the king. \* 7 Hen. 4. 6. † 11 Hen. 4. 35. 9 Hen. 6. 56. Dubitatur 14 Hen. 6. 5. b.]

Br. Aid del Roy, pl. 25. cites S. C.  
 † Br. Aid del Roy, pl. 30. cites S. C. but there it is said, that where a collector distrains for fifteenths in land charged to the tenths, and trespass is brought, he shall not have aid of the king. [And so is the Year book. 11 H. 4. 37. a.]—Br. Quinzime, &c. pl. 3. cites S. C.

Fitzh. Aid de Roy, pl. 36. cites S. C. [ 8. A *collector of tenths* for the king shall have aid of the king. 2 Hen. 5. 4. b. admitted.]  
 accordingly, if the plaint be of taking beasts for the sum assessed only; but if the plaint be of taking for a certain sum more than the sum assessed, the defendant shall not have aid for this tortious taking, and thereupon he pleaded to the action.



[ 9. A forester shall have aid of the king. 7 Hen. 6. 36.]

Fitzh. Aid  
de Roy, pl.

14. cites S. C.—Br. Aid de Roy, pl. 42. cites S. C.—See (P) pl. 1. S. C.

In trespass the defendant said that the place where is within the forest whereof the king is seised in fee, and that he is a forrester of a walk there, by patent for life, and prayed aid, which was granted him by consent of the plaintiff's counsel. D. 257. b. pl. 15. Hill. 9 Eliz. Smith v. Rigby.

[ 10. If an *escheator*, by colour of his office, seises a ward, supposing his ancestor to die in the king's homage, and a stranger brings a right of ward against him, he shall have aid of the king. 18 Hen. 6. 12.]

[ 11. If a man makes *conusance* as bailiff of the king for rent- See (E) pl. arrear, and prays in aid of the king, he shall have it. 4 Hen. 6. 4 S. C. Aid del Roy 121.]

12. *Trespass of beasts taken*, the defendant said, that king Edward had a court baron en D. which he granted to the mayor and commonalty of D. in fee-farm, and W. affirmed plaint there and recovered, and shewed certain, &c. by which *præcipe* came to the bailiff to make execution, and the defendant bailiff there took the beasts in execution; quære if well in a court baron; and prayed aid of the king, and it was said that he shall not have aid of the king but where he is immediate officer, and the attorney of the king said, that if the plaintiff would traverse the cause, yet the aid shall be granted of the king; for where the king has any interest, they shall not proceed till the king be counselled, which was affirmed by several. Br. Aid del Roy, pl. 101. cites 1 H. 4. 10.

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13. In *trespass* the defendant justified as bailiff of the hundred of D. to distrain for amercement, which is the same trespass, and prayed aid of the king. And per Prisot, he shall not have aid; for the sheriff is officer immediate to the king, and shall account for the hundred among the profits of the county, and therefore shall not have aid of the king. *Contra* of bailiff of the king of his manor; for he is officer immediate. Br. Aid del Roy, pl. 12. cites 33 H. 6. 29.

14. If it does appear to the court that the king's officer seises for the king any lands without warrant against the law, in an action brought against the officer, he ought not to have any aid of the king, neither does the writ *De domino rege inconfulto* lie in that case, because that which is done by him is void; and where the cause of aid fails, there no aid is to be granted; therefore in a real action, if the *escheator* be examined, and upon his examination says generally that he has seised the lands in demand into the king's hands, this is not good, and the action shall proceed, for he ought to shew the cause of the seizure, (as is implied in this act of 3 E. 1. cap. 24.) which cause, if it appear to be against the law, the judges of the law ought to disallow the same. 2 Inst. 207.

## (N) By an Officer. Upon what Plea.

Br. Aid del Roy, pl. 25. [ 1. ] N replevin against a collector of fifteenths, who avows the taking as a distress for it, if the issue be upon the place of taking, he shall not have aid of the king. 7 Hen. 4. 6.]  
 cites S. C.— Ibid. pl. 45.  
 cites S. C.— Fitzh. Aid de Roy, pl. 42. cites S. C.

Br. Aid del Roy, pl. 26. [ 2. But in debt, if the defendant justifies the buying of the things to the use of the king, and prays in aid, if the other says he bought them to his own use, yet he shall have aid of the king. 7 Hen. 4. 7.]  
 cites S. C.— See (M) pl. 4. S. C.

[ 3. If the king's officer make a contract to the use of the king, and after he is allowed for this in the Exchequer, yet in debt by the party after, he shall have aid; for perhaps it is not paid, though it be allowed, and perhaps the party hath released to the king. 11 H. 4. 28. b.]  
 Fol. 156. S. P. Br. Aid del Roy, pl. 29. cites  
 S. C.— Fitzh. Aid del Roy, pl. 44. cites S. C.

Br. Aid del Roy, pl. 29. [ 4. But otherways it is, if the officer be paid by the king for it; for thereby he is debtor to the party. 11 H. 4. 28. (as it seems.) ]  
 cites S. C.— Fitzh. Aid del Roy, pl. 44. cites S. C.

Br. Aid del Roy, pl. 30. [ 5. In debt upon an obligation, if the defendant says he was the king's buyer, and bought certain goods for the same sum, to the use of the king, and for the greater surety he made the deed, he shall have aid of the king, without shewing how he was allowed of this in the Exchequer. 13 Hen. 4. Aid del Roy 100. Curia.]  
 [ 187 ]  
 cites S. C.— Br. Quinzime, pl. 3. cites S. C.

Br. Aid del Roy, pl. 30. [ 6. In trespass against a collector of 15, if upon the plea of the parties it appears that he took the distress of such things that were not chargeable, though it was assessed by virtue of a commission, yet it is assessed he shall not have aid of the king, because the truth appears. 11 Hen. 4. 35. adjudged, 36. b. 37. b.]  
 30. cites S. C. As if for his beasts in D. or if he is assessed for all his goods in C. or if he be assessed for goods in S. and he has no goods there, and the collector distrains, and the other brings trespass, the collector shall not have aid of the king.—So where the collector distrains for 15th in land charged to the 10th, and trespass is brought, he shall not have aid of the king. Br. Ibid.—Br. Quinzime, pl. 3. cites 11 H. 4. 37. S. P. accordingly.

Fitzh. Aid de Roy, pl. 30. [ 7. In trespass against a collector, if it appears upon the plea that the tenths were 2s. which the defendant [plaintiff] said to the collector, and yet after the collector took these cattle for which the action is brought, and them detained till he was paid 1 s. 6 d. more, the collector shall not have aid of the king. 2 Hen. 5. 4. b.]  
 30. cites S. C.

8. In assise the plaintiff was of house and land, the tenant pleaded gift in tail by deed inrolled to the lord B. the remainder to the king, and prayed aid of the king, the plaintiff demanded oyer of the deed, and had it, and prayed that it be inrolled de verbo in verbum, and so it was;

was; and the deed was quod J. F. dedit officium & servitium forestæ sine ballivæ de D. in M. cum omnibus terris, &c. eidem officio pertinent' and livery and seisin, and the plaintiff demurred in law, and by all the justices he shall not have aid, because he has not alleged in the plea that the land was appendant to the office, and therefore the plea and the deed do not agree; quod nota. Br. Aid del Roy, pl. 92. cites 1 H. 7. 28.

(O) Upon what Plea or Issue.

[ 1. ] IN trespass, if the defendant says, that he was made collector of fifteenths with power to make sub-collectors, and to distrain them to make them levy the sum, and that he made the plaintiff his sub-collector, and distrained him for not levying, &c. if the plaintiff says he made J. S. his sub-collector, absque hoc that he made the defendant [plaintiff] his sub-collector, the defendant shall not have aid of the king, because the cause of his aid is traversed. 5 Hen. 5. 11. b. adjudged.]

Br. Aid del Roy, pl. 36. cites S. C.—Br. Counterple de Aid, pl. 8. cites S. C. accordingly.—Fitzh. Aid de Roy, pl.

37. cites S. C.—[N. B. Roll is according to the Year-Book and Fitzh. But Br. Aid del Roy, and Counterple del Aid, mentions the defendant as made sub-collector, and that the travers of being made sub-collector was by the defendant that he was not made sub-collector, but the said J. S.]

[ 2. Where the party may well maintain the issue without the king, he shall not have aid.]

[ 3. In replevin the defendant avows upon the plaintiff as his tenant, and the plaintiff says he held of the king, and so hors de son fée, and the defendant says within his fée, the plaintiff shall not have aid, (it seems because the king cannot aid him in this issue.) 14 Hen. 4. 26. b.]

\* Br. Aid del Roy, pl. 35. cites S. C. the plaintiff replied, that he held the

intire manor of the king by homage and 12 s. and demanded judgment if rege inconsulto, &c. & non allocatur, because it amounts only to hors de son fée, whereupon he said as above, and so hors de son fée, and the others e contra, and then the plaintiff prayed aid of the king, & non allocatur.—Fitzh. Aid de Roy, pl. 48. cites S. C.—Roll. Rep. 407. Arg. cites S. C. accordingly, and because it is in delay of the party. [ 188 ]

[ 4. In trespass, if the defendant justifies as in his freehold by lease from the king, the reversion to the king, he shall not have aid, for he need not have aid of the king to maintain this plea in trespass. My Rep. 14 Jac. for his freehold is a good bar of itself. \* 4 Hen. 6. 10. adjudged. 4 Hen. 6. 18. adjudged.]

\* Br. Aid del Roy, pl. 55. cites S. C. accordingly, and a man shall not

recover land nor franktenement in trespass, but damages only, which is no prejudice to the king; and after the defendant enforced his plea, and said, that the plaintiff claimed part of the park, &c. which in fact is the park of the defendant for life, the reversion to the king, ut supra, and prayed aid, & non allocatur.—Fitzh. Aid de Roy, pl. 9. cites S. C. Ibid. pl. 12. S. C.—Roll. Rep. 407. pl. 41. cites S. C.

[ 5. The same law in an ejectione firmæ. My Rep. 14 Jac. Ben- net adjudged, for this is in nature of a trespass.]

Roll. Rep. 407. pl. 42. S. C. by

Coke and Bridgman, contra Haughton.—See (A) pl. 13. S. P.—See Aid of a common person (A) pl. 1.

[ 6. If

In assise the bailiff of the tenant shewed, that A. leased to his

master for life, the remainder to the king in fee, and prayed aid of the king, and had it. Br. Aid del Roy, pl. 98. cites 8 H. 7. 11. and Brooke says it seems there, that aid shall not be granted upon plea of the bailiff.

In replevin the bailiff of the king justified, and prayed aid of the king; he shall have aid; but otherwise it is of a servant of the king's bailiff; for the bailiff is party to the consueance, but the servant is not; per all the justices in C. B. Nota. Br. Aid del Roy, pl. 100. cites 9 H. 7. 15.

A man shall not have aid of the king but where he is *bailiff, or servant immediate*. Br. Aid del Roy, pl. 9. cites 28 H. 6. 13.—Ibid. pl. 13. cites S. C. and S. P. accordingly.

7. In petition to repeal a patent of a seignior, the defendant pleaded, that it was granted to him in recompence of other thing with clause to answer in value if, &c. and prayed aid of the king, and had it. Br. Petition, pl. 11. cites 21 E. 3. 47.

8. Trespass by the bishop of Winton against the prior of St. John's, the defendant shewed that his predecessor was seised in right of the church, and died, and he was elected prior, and gave colour, the plaintiff shewed that his predecessor was seised till by W. N. disseised, who enfeoffed the predecessor of the defendant upon whom the plaintiff entered, &c. And the defendant traversed the disseisin, and so to issue. And after he shewed that this was the land of the Templers who were dissolved in the time of Edward II. and held of the king in frankalmoigne, and after it was enacted by parliament, that the hospitallers, viz. the defendant should have their lands, and that he should hold them of the lord of whom it was held by such services as the Templers held, and by judgment of the court the defendant was ousted of the aid; for he shall not have aid of the king but where the king shall be prejudiced, as where by the recovery of the land the king loses his rent-service and seignior, and by these words, (*such services*) he does not hold in frankalmoigne, for frankalmoigne is not any service; and also in trespass no franktenement nor land shall be recovered. Br. Aid del Roy, pl. 13. cites 35 H. 6. 56.

9. In trespass the defendant justified by command of the king, and well by award, and need not shew writing, but shall not have aid. Br. Prerogative, pl. 42. cites 39 H. 6. 17.

[ 189 ]

10. If in the pleading it appears that the aid is grantable of the king, and the tenant does not pray it, yet the court shall not proceed rege inconsulto. Br. Aid del Roy, pl. 92. cites 1 H. 7. 28.

Fol. 157.

(P) Where no Title appears to the King.

S. P. and yet it was not agreed whether the custom be good or not, by

[ 1. ] IN trespass for entering his chace, if the defendant shews that he is the king's forester in such a forest, and pleads a custom when any savage beast goes out of the forest to pursue it into any chace, &c. and to re-chase it into the forest, &c. and that he did accordingly, &c. he shall have aid of the king upon this plea, because the defendant

defendant cannot try this custom whether it is good or not without reason that the king. 7 H. 6. 36.] when the savages go

out none has the property, the king nor other; but because the aid of the king lies before issue joined the aid was granted, and the custom shall be disputed after. Br. Aid del Roy, pl. 42. cites S. C.——Fitzh. Aid de Roy, pl. 14. cites S. C. that the defendant has shewn an advantage to the king, which shall not be tried without making him a party.——See (M) pl. 9. S. C.

(Q) Upon what Plea. Not contrary to the Supposal of the Writ.

[1. ]N an assise of land in one county, if the defendant says, that the land is in another county, and that the king gave it to him by his letters patent, and prays in aid of the king, he shall not have aid upon this plea, because this is contrary to the supposal of the writ that the land is in another county; so that if the defendant grants the aid the writ shall abate. 21 E. 3. 19. adjudged.] Fitzh. Aid de Roy, pl. 2. cites S. C. but per Seton, if the king gives me one acre of, &c. and I am impleaded of

another acre in the same vill, I may say that the king gave me the land by the charter, &c. and it is no answer to the charter to say Nient comprise, without consulting of the king, quod fuit concessum, per Sharde, because in this last case it stands with the writ, whereas in the other case it is contrary.——See (B) pl. 1. S. C.

[2. In an assise, if the tenant says, that the king leased to him for life, the remainder over to B. and after the remainder came to the king by the forfeiture of B. and prays in aid of the king, he shall have it, though this be against the supposal of the writ. 1 Ass. 1. adjudged.] Fitzh. Aid de Roy, pl. 86. cites S. C.——Br. Aid del Roy, pl. 69. cites S. C.

but S. P. does not clearly appear.

3. In trespass the defendant justified as bailiff of the king, because the lodge was ruinous, whereupon he cut trees to repair it, and by the best opinion he shall have aid of the king. Br. Aid del Roy, pl. 10. cites 33 H. 6. 2.

(R) At what Time prayed. [Or granted.] [190]

[1. **W**HERE aid shall be granted of a common person after issue, it shall be granted of the king before issue. 4 H. 6. 18 b. \* 28 H. 6. 4.] \* S. P. Br. Aid del Roy, pl. 8. cites S. C.——

Fitz. Aid del Roy, pl. 25. cites S. C. adjudged generally, that a man shall have aid of the king before issue joined.

[2. In trespass aid shall be granted of the king, before any plea pleaded. 2 H. 6. 14.] Fitzh. Aid del Roy, pl. 7. cites S. C.

[3. In trespass aid shall be granted of the king before issue. 7 H. 6. 36.] S. P. Br. Aid del Roy, pl. 12.

cites 33 H. 6. 29.——S. P. Br. Aid, pl. 125. cites 5 E. 4. 1.——Br. Aid del Roy, pl. 102. cites S. C.——S. P. Br. Aid, pl. 21. cites 40 E. 3. 20.——Br. Aid del Roy, pl. 8. cites 28 H. 6. 4. S. P.

Br. Aid del  
Roy, pl. 8.  
cites S. C.  
For where  
a man

[ 4. In trespass for taking his goods, the defendant who justifies the taking for damage feasant, as bailiff of the king, shall have aid of the king before issue. 28 H. 6. 4. adjudged.]

justifies in right of the king, the cause is not traversable.—Fitzh. Aid de Roy, pl. 25. cites S. C. that the cause of the taking is not traversable.

\* S. P. and  
it is the fol-  
ly of the  
defendant;  
for he might  
have had  
aid before  
issue. Br. Aid del Roy, pl. 103. cites S. C.—Fitzh. Aid de Roy, pl. 31. cites S. C.

[ 5. Aid lies not of the king after issue, because the king cannot be party to maintain this issue taken by the party, and if the aid be granted, a *procedendo in loquela* cannot come from the Chancery, inasmuch as the plea is determined by the issue. 5 E. 4. 1. adjudged. \* 7 E. 4. 8. Curia. Contra 22 E. 3. 6. adjudged.]

S. P. ac-  
cordingly.  
But Brooke  
says quere  
of tenant at  
will; but  
because the  
replication

[ 6. [As] In trespass, if the defendant alleges a common in the king by prescription for him and his tenants at will, in the place where, &c. and that he being a tenant at will used the common, and the plaintiff takes issue upon the prescription, the defendant shall not have aid afterwards for the cause aforesaid, 7 E. 4. 8. Curia.]

was not entered, the tenant at will pleaded a bar de novo, and prayed aid of the king, and had it. Br. Aid del Roy, pl. 103. cites S. C.—Fitzh. Aid de Roy, pl. 31. cites S. C. and that the defendant waved the issue, and then had aid.

\* Fitzh. Aid  
de Roy, pl.  
71. cites  
S. C.—

[ 7. Aid does not lie of the king after issue, and a writ de rege inconsulto & procedendo thereupon. \* 22 E. 3. 15. b. Contra † 22 E. 3. 6.]

† Fitzh. Aid del Roy, pl. 70. cites S. C.

Br. Coun-  
terplea de  
Voucher,  
pl. 6. cites  
40 E. 3.  
S. P.—  
Br. Aid del  
Roy, pl. 12.  
cites 33 H.

[ 191 ]

6. 6. that  
in præcipe

quod reddat aid of the king shall be granted before issue joined.

8. In *præcipe quod reddat* the tenant vouched one as cousin and heir of J. viz. son of W. brother of J. and the demandant said that the father of the vouchee was a bastard, so that he cannot be heir to J. and the tenant confessed it, and relinquished the voucher, and said that this same J. leased to him for life, and held of the king, and died without heir, and so the reversion escheated to the king, and therefore prayed aid of the king, and had it, notwithstanding that he had vouched before. Nota, and the reason seems to be, that this aid-prayer of the king in the reversion, is in lieu of voucher. Br. Aid del Roy, pl. 14. cites 40 E. 3. 14.

9. If a man prays aid, and shews cause which is rejected, yet he may pray aid, and shew other cause, and so of several in one and the same term, and e contra after adjournment. The reason seems to be, because in the one case the cause is entered of record, and not in the other. But this is in aid of the king. Br. Aid, pl. 145. cites 3 H. 6. 5.

10. In *recordare* it was agreed, that he who makes consuance as bailiff of the king for rent due to the king by prescription upon a will for rent by them paid time out of mind, &c. shall have aid of the king, and this before issue joined. Br. Aid del Roy, pl. 58. cites 4 H. 6. 30.

11. If a man justifies as bailiff of the king, by reason of his manor which he has, by reason of the duchy of Lancaster, the de-  
fendant



defendant shall not have aid of the king before issue joined. Quod nota bene. Br. Aid del Roy, pl. 51. cites 15 H. 7. 17.

12. The king's immediate tenant, or his mediate tenant that joins with his immediate tenant, shall have aid in a personal action as well before as after issue joined; but his mediate tenant that does not join with his immediate tenant, shall not; per the Ch. Baron. Hard. 179. pl. 1. Pasch. 13 Car. 2. in the Exchequer, in case of Anderson v. Arundel.

### (S) At what Time to be granted.

Fol. 158.

[1. ] In an assise against two, if each takes the intire tenancy for life, the remainder to the king, and the demandant acknowledges one to be tenant, he, who is tenant, shall have aid presently before trial, for the demandant hath acknowledged him. 12 H. 6. 1. Curia.] See (T) pl. 4. S. C.

[2. And if the other be after found tenant, he shall have aid also. 12 H. 6. 1.] See (T) pl. 4. S. C.

3. In assise 2 judgments were vouched, where the tenant pending the assise or præcipe quod reddat &c. aliened, and after he prayed aid of the king, and had it, notwithstanding this alienation; but quære if the king may not refuse to give aid to him, by reason of the alienation. Br. Aid del Roy, pl. 71. cites 12 Aff. 41.

4. In trespass the defendant said that J. was seised, and did not shew of what estate, and died seised, and the manor descended to W. in ward of the king, and the king granted it to P. whose estate he has, and the heir is yet within age, and prayed aid of the king, & non allocatur, without justifying of the trespass, by which he justified that he put in his beasts, &c. and prayed aid of the king, and had it before issue joined. Quod nota; but not before justification. Br. Aid del Roy, pl. 2. cites 2 H. 6. 14. and 3 H. 6. 5.

5. If a man prays aid of the king, and shews cause, and is put over, and so several times in one and the same term, yet upon new cause shewn he may have aid of the king. Contra after adjournment in another term; per Marten. Brooke says Quære, if the same law be not in plea to the writ. Br. Aid del Roy, pl. 2. cites 2 H. 6. 14. and 3 H. 6. 5. Br. Brief, pl. 6. cites 3 H. 6. 5. S. P.

### (T) At what Time. Aid after Aid.

[192]

[1. ] If aid be granted of the king where it ought, and this is adjourned till another term, and then a procedendo comes, yet he shall not have new aid upon a new cause shewn, because he hath once delayed the party. 3 H. 6. 15. 15. And it is after adjournment.] Fitzh. Aid de Roy, pl. 8. cites 3 H. 6. 5. S. P. and Roll seen misprinted.—

If a man has aid of the king, and after has procedendo, he shall not allege new cause of the aid, viz. the tenant who was in esse at the time of the first aid; for upon aid granted all causes shall be examined in the Chancery; otherwise it seems of a new cause of later time. Br. Aid del Roy, pl. 99. cites 9 H. 7. 8. And by the Reporter, if the tenant after the procedendo in feoff. A. in

*in fee, who leases to the tenant again, the remainder to the king by deed enrolled, the tenant shall not have aid again; for it is the act of the tenant himself. Ibid.*

S. P. and  
e contra  
after ad-  
journalment.

[ 2. But if a man be ousted of aid for one cause, he shall have aid the same term upon a new cause shewn. 3 H. 6. 5. b.]

Br. Aid, pl. 145. cites S. C.——Fitz. Aid de Roy, pl. 8. cites S. C. and says that he may have aid after aid in infinitum, in one and the same term.——See (X) pl. 2.

Fitzh. Aid.  
de Roy, pl.  
4. cites  
Mich. 21  
E. 3. S. P.  
and seems  
to intend  
S. C.——  
See (U) pl. 1. S. C.

[ 3. If lessee for life hath aid of him in reversion, and the prayee comes not at the day, the lessee may say that the king gave the land to her and her husband, and to the heirs of the husband, and the husband is dead, and aid granted of his heir; upon this plea, shewing the charter, she shall have aid of the king. 21 E. 3. 59. b. adjudged.]

See (S) pl.  
1. 2. S. C.

[ 4. In an assise against two, if each takes the intire tenancy for life, the remainder to the king, and the demandant acknowledges one to be tenant, by which he hath aid, if the other be after found tenant, he shall have aid also. 12 H. 6. 1.]

5. When a procedendo is granted, and upon stay thereof a better right appears for the king, the court cannot proceed to judgment without another procedendo. Roll Rep. 291. Arg.

### (U) In what Cases it lies. *After Aid of another Person.*

See (T) pl.  
3. S. C.  
† The  
words are,  
De Roy pur  
Cause del  
Reversion;  
but Fitzh.  
Aid del Roy,

[ 1. ] In a *præcipe quod reddat*, if the tenant hath aid of the heir + of her husband, because of the reversion, who comes not upon the summons, the tenant may after say that the king gave the land to her and her husband, and to the heirs of her husband, and shews forth the charter of the king, and shall have aid of him. 21 E. 3. Aid del Roy 4. adjudged.]

pl. 4. S. C. is of a *præcipe* brought against the feme of R. who prayed aid of the heir of R. because of reversion, &c. and so it appears that the word (Roy) is misprinted.

[ 193 ]  
Br. Aid, pl.  
82. cites  
S. C. contra  
that he was  
ousted by

[ 2. If a tenant at will, according to the custom, hath aid of the archbishop of Canterbury, his lord, and after the lord dies, the temporalities being in the king's hands, he shall have aid of the king. 21 H. 6. 37. agreed, admitting that such a tenant at will shall have aid, of which there is a doubt.]

award. for there is no privity between him and the king, and the thing does not lie in custom, for it is repugnant, for when the bishop died, the will is determined, and so the interest determined.——Br. Aid del Roy, pl. 46. cites S. C. accordingly.——Fitzh. Aid de Roy, pl. 2. cites S. C.——(H) pl. 11. 12. S. C.——Br. Aid del Roy, p. 56. cites 4 H. 6. 11. where after avoidance of the bishoprick by translation, and the temporalities coming into the king's hands, such tenant at will prayed aid of the king, and had it, by the opinion of the whole court.

3. *Scire Facias* to repeal letters patent against tenant for life, the remainder over in fee of the grant of the king, the tenant for life prayed aid of him in remainder, and had it, and upon the joinder they

they prayed aid of the king, and had it. Br. Aid, pl. 44. cites 7 H. 4. 41.

4. King Richard the 2d had land in ward by descent from king Edward the 3d; for a chattel shall descend in the case of the king, contra of a common person, and granted the land by letters patent to W. for life, the remainder to J. in fee; and the heir, who was in ward, sued scire facias to repeal the letters patent, and to have livery, and the tenant for life prayed aid of him in the remainder, and had it, and he came and joined, and they two prayed aid of the king, and had it, and after came procedendo in loquela, and they proceeded in pleading, and demurred, and judgment given that the letters patent should be revoked, and the land re-seised into the king's hands, and livery made to the heir; and there it does not appear, that there was any procedendo ad judicium, as in 9 H. 6. Br. Aid del Roy, pl. 28. cites 7 H. 4. 41.

Br. Aid, pl. 44. cites S. C.

(X) In what Cases Aid lies after Aid.

[1. IF aid be prayed of the king upon a certain cause shewn, the which is adjudged no cause of aid, and so he is ousted of aid, yet the same term he shall have aid of the king upon another sufficient cause shewn. 8 H. 7. 11. b.]

Br. Aid del Roy, pl. 2. cites 2 H. 6. 14. & 3 H. 6. 5. S. P. —S. P. And

when it is in Chancery, procedendo shall not be granted till the title of the king be examined; for if the first cause be not sufficient, yet now a better title may be shewn for the king; quod nota, per Brian & Hufley Ch. Justices. Br. Aid del Roy, pl. 98. cites S. C. —Fitzh. Aid de Roy, pl. 35. cites S. C. —Br. Aid del Roy, pl. 2. cites 2 H. 6. 14. and 3 H. 6. 5. S. P. accordingly.

[2. If aid be granted of the king upon an insufficient cause, upon which a procedendo is granted out of Chancery in another term, the party shall not have aid again of the king, though he shew other sufficient cause, because he might have shewn this cause in Chancery in stay of the procedendo. 3 H. 6. 6. adjudged. 8 H. 7. 11.]

Br. Aid del Roy, pl. 98. (97.) cites S. C. —Fitzh. Aid de Roy, pl. 35, cites S. C. —

Br. Aid del Roy, pl. 2. cites 2 H. 6. 1. 4. and 3 H. 6. 5. S. P. —See (T) pl. 2. S. C.

3. Scire facias was brought by the abbot of L. against the dean of E. upon a recovery against his predecessor in writ of annuity, the dean said, that the king was seised of the advowson of the deanry discharged, and made collation to discharge him, so held he of the collation of the king, and prayed aid of the king, and had it, and yet his predecessor had aid of the king before; but it may be, that the plaintiff had released to the king after, &c. and yet dean and chapter have common seal, and it is said that of the bishop otherwise it is, and that he shall not have aid of the king; for he is elective, and not presentable by the king, and yet the plaintiff recovered in the first action by verdict; And it was agreed, that the church was no otherwise discharged but by non-payment; and so nota, this delay suffered in scire facias notwithstanding the statute. Br. Aid del Roy, pl. 39. cites 38 E. 3. 18.

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*But for cause of later time he shall have aid again.* 4. A man shall not have aid of the king twice *for one and the same cause*, per Paston. Br. Aid del Roy, pl. 3. cites 9 H. 6. 3.  
Br. Aid del Roy, pl. 3. cites 9 H. 6. 3.

### (Y) In what Cases the Court *ex officio* ought to grant it.

Fitzh. Aid de Roy, pl. 8. cites S. C. [ 1. ] IF the party will not speak of aid-prayer, and it appears that *it is in the right of the king*, the court is not bound *ex officio* to grant aid. 3 H. 6. 6.]

Br. Of- fice del, &c. pl. 1. cites S. C. thus: Where it *appears that the party has good cause to have aid*, and the party does not pray aid of the king, the court is not bound *ex officio* to grant to the party aid of the king, per Martin; quod nota for law, & nemo dedixit.——If in pleading it appears that the aid is grantable of the king, and the tenant does not pray it, yet the court shall not proceed *rege incon-*sulto. Br. Aid del Roy, pl. 92. cites 1 H. 7. 28.——Br. Office del, &c. pl. 18. cites 1 H. 7. 30. and 4 H. 7. 1. contra, that the court *ex officio* ought to cease till the aid be had.

In *trespass*, where it appears by deed that a lease is made to the defendant for life, the remainder to the king, if the tenant will not pray aid of the king, the court shall not proceed without making the king party. Br. Aid del Roy, pl. 100. cites 9 H. 7. 15.——If it appears to the court that the tenant ought to have aid of the king, but he does not pray it, yet the court *ex officio* ought to cease till the aid be had. Br. Office del, &c. pl. 18. cites 1 H. 7. 30. and 4 H. 7. 1.——Cro. E. 417. pl. 12. S. P. Arg. and that when they do not the king may enforce them to it by his writ, and that such a writ has been awarded cites F. N. B. 154. 21 E. 3. 44. and 31 E. 3. Saver Default 27. but that those are in real actions, yet it may also be in personal actions, where the king's title appears to come in question, and that so is 2 R. 3. 13.——Roll. Rep. 208. Arg. cites 16 H. 7. 12. to have been adjudged in *trespass*, that where the interest of the king appears the court *ex officio* ought to stay it, and that so is 11 H. 4. 70. and 4 Eliz. Com. 243, 244. by writ of *rege incon-*sulto.

### (Z) Counterplea.

Fitzh. Counter-plea del Aid, cite 9 H. 6. 61. S. C. [ 1. ] NOT *parcel* is no good counterplea. 9 H. 6. 62. because this shall *not be tried without making the king party*. \* 9 H. 6. 62. 43 Aff. 6. 20 E. 3. Aid 1. per Wilby.]

Fitzh. Counter-plea de Aid, pl. 9. cites S. C. & S. P. accordingly. [ 2. In *trespass*, if the defendant *justifies as in parcel of a manor to him granted by the king, and makes a title to the king to the manor*, it is no good plea for the plaintiff to say that *the action is brought for a trespass done in another part, which is not parcel of the manor*, for not parcel or *nient comprise* is no good counterplea of aid. 9 H. 6. 62.]

[ 195 ] [ 3. If the defendant in an action *shews cause to have aid*, the plaintiff shall not have any *traverse* to the cause of taking. 28 H. 6. 4.]

[ 4. Nothing in the reversion is a good counterplea of aid. 12 H. 6. 1. b.]

\* Fitzh. Aid, pl. 1. cites Mich. 20 E. 3. an t so it seems it should be here, and that it is misprinted. [ 5. *Nient comprise* is no good counterplea, for this shall *not be tried without making the king party*. 21 E. 3. 19. b. 39 E. 3. 12. b. per Thorp. 25 E. 3. 42. b. adjudged. \* 32 E. 3. Aid 1 per Fisse, 25 E. 3. Aid del Roy, 72. adjudged.]

——If a man has patent of the king of certain land, and

and assise is brought against him of other land, and he says that this land is comprised, and prays aid of the king, he shall have aid, and nient comprise is no plea. Br. Aid del Roy, pl. 10. cites 33 H. 6. 2.—In trespass the defendant said, that the place where is within the forest whereof the king is seised in fee, and that he is forester of a walk there by patent, and the place where is parcel of the said walk, and demanded judgment if rege inconsulto, &c. The plaintiff counterpleaded, that the said place where, &c. was out of the limits and bounds of the forest, and not within nor parcel of the said walk, &c. Several cases were cited pro and con. and Welshe and Weston held the counterplea not good, but Brown and Dyer e contra; and afterwards in another term the plaintiff's counsel granted the aid gratis. D. 257. b. pl. 15. Hill. 9 Eliz. Smith v. Rigby.

[6. [So] in an assise, if the tenant says that he has granted the land by his charter to the king, and so the king is seised, and prays of him. Nient comprise in the charter is no counterplea of aid. 38 Aff. 16.]

S. P. Br. Aid del Roy, pl. 85. cites 8 Aff. 16. and so are all the

editions of Brooke, but they all seem to be misprinted, and that it should be 38 Aff. 16. according to Roll.

[7. So in an assise, if the tenant says that he has infeoffed the king of the land, and so he is tenant, and has a writ to the justices, certifying, that the king has purchased the land of the tenant, and prays aid, it is no counterplea that the lands in demand are other lands. 38 Aff. 16. adjudged.]

And by some because the writ was Si ita sit, &c. therefore it shall

be inquired by the assise if these are the same lands or not, and others e contra, and that aid of the king ought to be granted. Br. Aid del Roy, pl. 85. cites 8 Aff. 16.

[8. In an assise of land in Winchester, if the tenant prays in aid of the king because he is a fee-farmer of the city of Winchester, of which this land is parcel rendering rent, it is no good counterplea for the demandant to say that A. was seised of this land at the time of the fee-farm, and held it of the king rendering rent, and that it continued after in the hands of divers burgesses, till the demandant purchased it in fee, to which the tenant has put his seal affirming the purchase, &c. for it seems this amounted only to this, that it is not comprised within the charter of the king. 43 Aff. 2. Curia.]

Br. Aid del Roy, pl. (88) 89. cites S. C. and the opinion of the court was, that the aid was grantable, and therefore the plaintiff was non-

sued. Fitzh. Aid de Roy, pl. 92. cites S. C.

[9. In an action, if the defendant pleads the king's grant by patent to him, by which he ought to have aid, and prays it, it is no good counterplea for the demandant to shew special matter by which the king had no estate to grant at the time of the grant, and so the patent void, for the king's patent shall not be avoided without making him party. 39 E. 3. 12. b. adjudged by all the justices.]

Roll. Rep. 293. Arg. cites 37 H. 6. 32. S. P.

[10. When one justifies in the right of the king, a man shall have no traverse to the cause of the taking. 28 H. 6. 4. per Prisot.]

Fol. 160.

S. P. Br. Aid del Roy, pl. 8. cites S. C.

[11. As in trespass for taking his goods, if the defendant justifies for damage feasant in the soil and freehold of the king and his bailiff, it is no good counterplea for the plaintiff to say, that he took them of his own wrong, &c. absque hoc that he was the bailiff or servant of the king. 28 H. 6. 4. adjudged.]

[196] Br. Aid del Roy, pl. 8. cites S. C.

Br. Aid del Roy, pl. 10. cites 33 H. 6. 2. S. C. but S. P. of the counterplea does not appear. — Fitzh. Aid de Roy, pl. 26. cites S. C. and S. P. accordingly. — Br. Aid del Roy, pl. 64. cites 37 H. 6. 22. contra, that where a man justifies as bailiff of the king, it is a good plea that he was not bailiff at the time of the trespass. — Br. Counterple de Aid, pl. 27. cites 37 H. 6. 28. 32. accordingly.

[12. So in trespass for breaking his close, if the defendant justifies for that the place where, &c. was the king's forest, and he as bailiff entered and repaired the lodge, &c. it is no counterplea that he was not bailiff. 33 H. 6. 3, per Prisot.]

13. If a man demands judgment *rege inconsulto* by reason of the ward of the heir of him who was patentee of the king in tail, it is no counterplea that after the gift by patent the plaintiff himself recovered the land against the father of the infant; quod nota, but shall sue to the king by petition. Br. Counterple de Aid, pl. 28. cites 22 Ass. 24.

Br. Aid del Roy, pl. 52. cites S. C.

14. A man demands judgment *rege inconsulto*, because the king seised the ward of the land and heir of this tenant in the writ of entry, by reason of ward, and granted it to J. C. it is no plea that the king did not seise, nor that the lands are not comprised in the patent; quod nota. Br. Counterple de Aid, pl. 14. cites 24 E. 3. 12 & 13.

15. If a parson prays aid of the king, because he is in of his presentment, it is a good counterplea that the plaintiff is patron, and was a prior alien, and the king seised his temporalities in time of war, and presented, and after the king restored him after the war, &c. For now the cause of the aid is determined. Br. Counterple de Aid, 6. cites 46 E. 3. 6.

16. In trespass, the defendant said that the king by his letters patents granted to him the land, and prayed aid of the king, &c. and the other said that the king had nothing at the time of the grant, and upon this issue taken, which was tried, &c. and continued 12 years in petition. Br. Counterple de Aid, pl. 20. cites 4 H. 7. 7.

But in assise if the tenant says that J. N. leased to him for life, the reversion to the king, and prays aid of him, and the other says

17. In trespass, the defendant said that he held of the king a house and 4 acres in D. as of his manor of D. parcel of his duchy of Lancaster, at the will of the king, according to the custom of the manor, and cut trees for house-boote and hay-boote, appendant to his tenement. Per Chocke, he held nothing at the will of the king at the time of the trespass. And the opinion of the court was, that it was a good plea to oust the defendant of the aid of the king in B. R. the same year. Br. Aid del Roy, pl. 64. cites 37 H. 6. 32.

that the king had nothing of his lease, this shall not be tried here, but in the Chancery. And this in assise, and contra in trespass. Ibid.

Br. Counterple de Aid, pl. 13. cites 15 H. 7. 10. S. P. and by Read the counterplea is good, but Frowike demurred.

18. In trespass, the defendant said that E. bishop of L. was seised and leased to the defendant according to the custom of the manor, &c. by copy, and after the bishop was translated to E. by which the temporalities came into the hands of the king, and remain there yet, and prayed aid of the king. Per cur. you should say judgment, if *rege inconsulto*, and not pray aid, and then the opinion of the court was that it is a good plea, and he shall sue to the king; wherefore the plaintiff said that this is other land, and not the land leased, and a good



a good counterplea per Read J. And per cur. in this case the defendant *need not give colour* when he prays aid, contra if in bar, Br. Aid del Roy, pl. 67. cites 21 H. 7. 43. (in the old book.)

(A. a) In what Cases it shall be granted, *for all* [ 197 ]  
or Part.

[ 1. ] N a writ of *dower against four of the third part of a manor*, if they say they hold four parts jointly, and two of them hold the fifth part of the grant of the king, so long as the land remains in the hands of the king, by reason of the forfeiture of one who held jointly with the fourth, because the fifth part is not severed from the four parts they shall have aid of the king for the whole, because if the demandant recovers, she shall have *execution per metas, &c.* And it is not reasonable that a severance should be without the king. 12 H. 4. Aid del Roy 47.]

[ 2. In a writ of dower, if the *tenant vouches the heir in ward of the king and others*, the other shall not answer till he hath sued to the king. 12 H. 4. Aid del Roy 47. per Herle.]

See 2 Inst. 271. the last parag. on the stat. de Bigamis, cap. 3.

(B. a) Entry, Proceedings, Pleadings, &c.

1. [ N *assise*, the tenant came by *bailiff*, and said that the tenements are seised into the hands of the king for alienation of his tenant without licence, and demanded judgment *rege inconsulto, &c.* if, &c. nul tort. And the *escheator* being present was examined and confessed it, and that he by warrant seised it, wherefore the court said, sue to the king, and so he did, and brought *procedendo si illa de causa & non alia secta fuit, procedatur, but non ad iudicium.* And now the tenant shewed deed of warranty of the king, and prayed aid of the king, and the deed bore *date mesne between the original of the assise and the writ of procedendo.* And the best opinion was that he shall not have aid. Br. Aid del Roy, pl. 72. cites 22 Ass. 5.

2. In *assise* it is said that after the *plaintiff* is put to sue to the king for aid of the king granted to the tenant, or the like, there the *procedendo ad captionem assisæ or ad iudicium, ought to accord with all pleas and originals, and of tenants and of manors.* Br. *Procedendo*, pl. 7. cites 22 Ass. 28.

3. In *assise*, it is no plea that the tenements were seised into the hands of the king, judgment, &c. but shall say that they still remain in the hands of the king, and because the *escheator*, nor *sheriff*, nor *serjeant* was not present there, this shall be inquired by the *assise*, per Stouf. and so it was, nota, Br. Aid del Roy, pl. 76. cites 26 Ass. 10.

4. In *assise*, the tenant shewed charter which willed that king Richard the first concessit & dimisit to B. and his heirs such a tenement to hold by certain services, and so held of the king, and prayed aid

aid of the king. Thorp said here is *no dedi nec warranty*, therefore he shall not have aid. Skip. said the natural conclusion had been *rege inconsulto*, and not to have prayed aid of the king; and after all the justices gave day before themselves at Westminster 15 Pasch. and interim sequatur versus regem. Thorp said there is a great diversity between aid prayer of the king and *rege inconsulto*, for in aid prayer he ought to speak with the king himself, and in the other case not. Br. Aid del Roy, pl. 78. cites 28 Aff. 39.

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5. In assise of a corody after aid of the king had, the tenant was not received to plead variance in the plaint and the specialty. Thel. Dig. 208. lib. 14. cap. 8. f. 1. cites 29 Aff. 55.

6. *Præcipe quod reddat*, the tenant prayed aid of the king by a gift in tail, the reversion to the king, and the aid granted and suit thereof shall be in the Chancery, and the warranty shall be tried, and then they shall plead to the issue there, and then shall be remanded into bank to try the issue, and in the mean time *superfedeas* shall go to the bank that they shall not proceed till *procedendo ad capiendum inquisitionem*. Br. Aid del Roy, pl. 38. cites 38 E. 3. 14.

Kelw. 157.  
b. Mich. 2  
H. 8. Arg.  
says this  
statute is  
only an  
affirmance  
of the common law.

7. 1 H. 4. cap. 8. A special assise is maintainable by the disseisor for such lands as are granted by the king's patent without title first found by inquest for the king, without suit to be made to the king in that behalf, and if the patentee pray in aid of the king, a *procedendo* shall be also granted without suit.

Thel. Dig.  
208. lib.  
14. cap. 8.  
f. 3. cites  
Trin. 2 H.  
4. 25. S. P.  
according-  
ly.

8. In formedon the tenant prayed aid of the king, and after pleaded in abatement of the writ, that the demandant had made omission of a descent in one who held estate, and the demandant was compelled to answer to his challenge after the aid. Quod nota. Br. Brief, pl. 97. cites 2 H. 4. 19.

9. *Scire facias*, because the plaintiff himself had been in possession by force of letters patent of the gift of the king, by which he claimed, and the tenant demanded oyer of the letters patent, and was ousted thereof, because the plaintiff had been in possession, and the action is of his proper seisin. Br. Oyer de Records, pl. 34. (bis) cites 7 H. 4. 40.

10. Where a man prays aid of the king, by reason of land seised into the king's hands, this shall be warranted by shewing the record of it, unless it be in assise or the Exchequer. Br. Monstrans, pl. 35. cites 11 H. 4. 83.

Br. Aid, pl.  
52. cites  
S. C. —  
Br. Proce-  
dend, pl. 4.  
cites 11 H. 4.  
26. S. P.

11. Per Thirne. first upon aid of the king *procedendo in loquela* shall go, and after *procedendo ad iudicium*. Br. Aid del Roy, pl. 32. cites 11 H. 4. 85.

12. Note, by all the clerks, that if the tenant prays aid of the king to have recompence upon warranty, or for feebleness of his estate, the entry in the roll is all one. Br. Aid del Roy, pl. 3. cites 9 H. 6. 3.

13. But per Cott. where the tenant upon his aid demands judgment, if *rege inconsulto*, it is always for the feebleness of estate. Ibid.

14. Where a man prays aid of the king by cause of the warranty, or

or clause of the recompence, and he is impleaded, and prays aid of the king for such cause *in lieu of the voucher*, the special matter shall be entered, and otherwise he shall never have recovery in value by petition, by all the clerks. And so see that *his recovery in value shall be by petition*; and the best opinion there was, if the tenant prays aid of the king, that after procedendo he shall not vouch a stranger. Br. Aid del Roy, pl. 3. cites 9 H. 6. 3.

Br. Garranties, pl. 2. cites 9 H. 6. 4 S. C. & S. P. — Br. Voucher, pl. 6. cites S. C.

15. The party's aid-prayer is where it is for his advantage to have in value, and then this ought to be *specially entered* in the course of his aid-prayer, or *otherwise he shall not have in value*, 9 H. 6. 4. Sometimes for *feebleness of the party's estate* to plead (or pray) it, and then, per Cott. the entry is, Judgment, &c. *si rege inconsulto*. F. N. B. 153. (F) in the new notes there (b).

16. If any man prays in aid of the king in a *real action*, and the aid be granted, it shall be *awarded that he sue unto the king in the Chancery*, and the justices in C. B. shall *surcease*, until the writ of *procedendo in loquela* comes unto them, &c. and then they may proceed in the plea so far on till they ought to give judgment for the plaintiff, and then the justices ought not to proceed to judgment, till the writ comes to them to proceed to judgment, which is called a writ de procedendo ad iudicium; and the same of a personal action. F. N. B. 153. (E).

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The English edition cites in Marg. 9 H. 6. 12. 13. — If the tenant in a *præcipe* prays aid of the king, by reason of

the warranty, the warranty shall be tried in the Chancery, and a writ shall be sent into C. B. to take the inquest; but if they plead in Chancery, and there it appears that the defendant has right, the king shall have a writ to C. B. reciting the matter, and commanding them to supersede, &c. because judgment shall be there given *quod tenens eat inde sine die*. F. N. B. 153. (E) in the new notes there (a) and cites 38 E. 3. 14. And per Thorpe, the right shall not be tried in Chancery, but in case where the king has the reversion the parson may, but does not pray in aid, &c. cites 38 E. 3. 19. And therefore if the king has a release of the annuity, and pleads it, it shall not be brought into Chancery; for the aid is granted only to maintain or support the parson, although he pleads, cites 19 H. 6. per Newton; and says see 13 H. 4. 3.

17. If the cause of aid-prayer of the king is *insufficient*, the plaintiff in his replication thereto shall pray that he be ousted of the aid, and shall not pray seisin of the lands in *præcipe quod reddat*, nor writ to the bishop in *quare impedit*. Br. Aid del Roy, pl. 6. cites 9 H. 6. 56.

18. *Scire facias* against the successor of a parson upon arrearages of annuity recovered against the predecessor, who said that queen E. was seised of the manor of S. to which the advowson is appendant, of the dowment of king H. and presented this same defendant discharged, &c. the reversion to the king, and prayed aid of the king and ordinary, and had it; and he was compelled to shew in what manner and where the queen was endowed, and so he did. Quod nota; for it is now part of his title. Br. Aid del Roy, pl. 44. cites 19 H. 6. 2.

19. In *scire facias* against a parson upon recovery of annuity, the defendant prayed aid of the king, patron, and of the ordinary; and it was doubted if process shall issue against the ordinary before *procedendo*; for where they come they shall not plead without the parson, and ought to join. Br. Process, pl. 61. cites 19 H. 6. 5.

20. In *trespass* the defendant prayed aid of the king, the plaintiff may counterplead it; but in *assise e contra*; for there he shall not be

be counterpleaded, but in the Chancery, and not in bank. Note a diversity. Br. Counterple de Aid, pl. 18. cites 37 H. 6. 32.

21. Note per Fitzherbert J. clearly, that where a man prays aid of the king *in trespasss, or other action in bank*, and shews cause as he ought, the plaintiff or demandant *shall not have traverse to it there*, but *shall answer to it in the Chancery*, and if the cause be there disproved, he shall have *procedendo*. Br. Counterplea de Aid, pl. 1. cites 27 H. 8. 28.

22. Upon the aid prier, or writ, the award is *Quod tenens sine defendens sequatur penes dominum regem*, and the tenant or defendant ought to remove the record into the Chancery, and in the case of the aid prier the plea is not put without day. 2 Inst. 269.

For more of Aid of the King, see Aid of a Common Person, *Rege inconsulto*, and other proper titles.

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Fol. 161.

\* Aid-prayer is the suit of the tenant, with which the demandant has nothing to do. Br. Voucher, pl. 96. cites M. 14 E. 3. per Wilby. See Aid of the King (A) pl. 13. S. C.—(O) pl. 5. S. P.

## Aid of a Common Person.

### (A) Aid. \* In what Actions it lies.

[ 1. **A** ID lies in an *ejectione firmæ* for the defendant, when the title of the land is to come in question. Pasch. 3 Jac. B. R. adjudged.]

\* But contra if defendant intitles himself to estate for life; for then he has franktenement, which is suf-

ficient to plead in this action; for by trespasss no franktenement shall be recovered. Br. Aid, pl. 85. cites 22 H. 6. 19.—Br. Aid del Roy, pl. 47. cites 22 H. 6. 17.

† Br. Aid, pl. 127. cites S. C. accordingly, but the plaintiff shall not have aid in trespasss, per tot. cur. † Br. Aid, pl. 148. cites S. C. || Br. Forcible Entry, pl. 6. cites 22 H. 6. 17.

S. C.—Fitzh. Aid de Roy, pl. 23. cites S. C. ¶ Br. Aid, pl. 32. cites S. C. accordingly.

Aid in trespasss is only to maintain the issue, and not to answer. Br. Aid, pl. 45. cites 8 H. 4. 17. per Hulls.

S. P. if only one of them is named.

Contra if both are named. Br. Aid, pl. 31. cites S. C.

[ 3. So if the defendant justifies as bailiff to the lord of a town. 45 E. 3. 1 b.]

[4. So if he justifies *as tenant at will* of B. 7 H. 4. 31. b.]

S. P. Br.  
Aid, pl. 43.  
cites S. C.

[5. In trespass, if the *issue* be *upon the right*, the lessee for life being defendant, shall have aid of him in reversion. 22 H. 6. 18.]

[6. If a man *recovers in a contra formam collationis* in [and brings] a *scire facias*, against tenant by the curtesy, being ter-tenant, to execute this judgment, he shall have aid of the heir in reversion. 2 H. 4. 16. b.]

*Contra formam collationis against an abbot, supposing that his predecessor*

*for had aliened, and the scire facias against the tenants, who came and shewed that their ancestor died seized, and he had this land in partition by descent, and prayed aid of his coheir, and that the parol demur for his nonage, and the opinion of some was that the aid lies, but not the age. Br. Aid, pl. 36. cites S. C.*

*Scire facias against the tenant, and he prayed aid of him in reversion, and had it; quod nota. Br. Aid, pl. 20. cites 40 E. 3. 18.*

[7. The plaintiff in an action of trespass shall not have aid of him in reversion. *As in trespass, if the defendant pleads in bar, and the plaintiff traverses the bar, upon which they are at issue, and the plaintiff says that he is lessee for years, the reversion to A. yet he shall not have aid of A. 6 E. 4. 2. b. adjudged. \* 5 H. 7. 16. b.]*

\* Fitzh.  
Aid, pl. 96.  
cites S. C.—  
S. P. *But*  
the plaintiff  
in replevin  
shall have  
aid, for re-  
turn shall

*be awarded against him, and so he shall be charged, but the plaintiff shall not be charged in trespass; and also after avowry the defendant is become actor, and the plaintiff is become defendant. Br. Aid, pl. 127. cites S. C.,—Fitzh. Aid, pl. 86. cites S. C.*

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[8. In a *cessavit* against a vicar or parson, he shall have aid of the patron and ordinary. 21 E. 3. 55. b.]

Fitzh. Aid,  
pl. 55. cites  
S. C.—Ibid.  
pl. 182. cites S. C.—See (X) pl. 27. 37. S. C.

[9. So aid lies, though it be of his own cesser. 22 E. 3. 3. adjudged.]

Fitzh. Aid,  
pl. 3. cites  
S. C.

[10. [But] in a *cessavit* against a layman of his own cesser, he shall not have aid. 28 E. 3. 96. adjudged. 32 E. 3. Aid 42. adjudged.]

Fitzh. Aid,  
pl. 13. cites  
S. C. The  
tenant

*prayed aid of him in remainder, and was ousted by award, because it was of his own tort.*

[11. In an *attaint* against tenant in dower of the assignment of the heir, she shall have aid of him in reversion. 30 E. 3. Aid 36.]

S. P. Br.  
Aid, pl. 25.  
cites 42 E.  
3. 26.

[12. Aid lies in an *attaint*, though there be danger by the death of the jurors. \* 40 Ass. 20. adjudged. 30 E. 3. Aid 36.]

\* Fitzh.  
Aid, pl.  
158. cites  
S. C.—Br. Aid, pl. 111. cites S. C.—See (I) pl. 20. S. C.

[13. In an *affise* no aid shall be granted. 3 H. 4. 14. b. \* 1 H. 7. 29. b. of one that is not party to the writ.]

\* Fitzh.  
Aid de Roy,  
pl. 32. cites

*Hill 1 H. 7. 28. S. C.—See (Q) pl. 16. S. C.—Br. Aid, pl. 111. cites 40 Ass. 20. S. P.—See Aid of the King, pl. 7.—In writ of entry in nature of affise aid lies, though it lies not in affise. Br. pl. 123. cites 4 E. 4. 14.*

[ 14. So

\* Br. Aid, pl. 111. cites S. C. and that though aid should not be granted in the assise, yet it lies in the attainr upon a false verdict given in the assise. —Fitzh. Aid, pl. 158. cites S. C.—See (1) pl. 20. S. C.

[ 14. So in an *attaint upon a verdict in an assise*, because it is of the nature of the assise. 3 H. 4. 14. b. Contra \* 40 Aff. 20. adjudged. 30 E. 3. Aid 36.]

\* Br. Aid, pl. 55. cites S. C. and Fitzh. tit. Counter. de Aid, 3.

[ 15. In a *seffa ad molendinum* in the *debet & solet* of his own *subtraction*, and upon a *seisin* by the hands of the defendant himself, yet if the *prescription* be traversed, and so the thing to be tried in the right, the defendant, being lessee for life, shall have aid of lessor. \* 17 E. 3. 65. because the *suit is in the right*. 13 E. 3. Aid 36. adjudged, but there is no traverse that appears.]

Fol. 162. [ 16. The same law of tenant by the curtesy and tenant in dower. 13 E. 3. Aid 36. adjudged.]

[ 17. In a *quod permittat villanos facere seffam ad molendinum* against one coparcener, she shall have aid of her companion, though this is of her own subtraction. 18 E. 3. 56. adjudged.]

Fitzh. Barre, pl. 288. cites Mich. 25 E. 3. 50. S. P.

[ 18. If a parson be presented for subtraction of the alms of an hospital of the king's foundation, he shall have aid of the patron, though this be of his own subtraction. 25 E. 3. 54. adjudged.]

[ 19. In a writ of intrusion, supposing the tenant himself to have abated, if the tenant says that he is tenant for life, yet he shall not have aid of him in reversion, because this is of his own wrong. 3 E. 2. Aid 162. adjudged.]

\* S. P. Br. Aid, pl. 4. cites S. C.

[ 20. If the grantee of a rent-charge brings a writ of rescous against the tenant for life, he shall not have aid, because he shall not recover the rent but damages for the rescous. \* 2 H. 6. 8. But otherways it is in replevin. 2 H. 6. 8.]

[ 202 ] [ 21. If a tenant leases for life, the remainder in fee, and the executor of the lord brings debt against the lessee for the arrearages of rent, (admitting it lies) he shall have aid of the remainder. 2 H. 6. 8. b.]

\* S. P. if it be not in lieu of voucher; for other-wise no-thing shall be recovered but the presentment. Br. Aid del Roy, pl. 97. (96) cites S. C.—Fitzh. Aid, pl. 96. cites S. C. † Br. Aid, pl. 120. cites S. C.

[ 22. No aid lies in a *quare impedit*, because this is brought of his own wrong, and also for the mischief of the lapse inturring in the mean time. \* 5 H. 7. 16. Curia. † 9 H. 7. 15. b. Curia. ‡ 21 H. 7. 21. adjudged.]

S. P. And also the Action is only personal, in which a man shall not have aid before issue joined, as in trespass. But Brooke says that quare impedit is a mixed action, as appears elsewhere. Br. Aid, pl. 101. cites ‡ S. C.

Fitzh. Aid, pl. 96. cites S. C. for no patronage shall be recovered in assise of darrein presentment, any more than in quare impedit.

[ 23. So aid lies not in an assise of *darrain presentment* for the cause aforesaid. 5 H. 7. 16. b.]

S. P. Br. Aid, pl. 113. cites S. C. —

[ 24. If a writ of error be brought against tenant in dower of him that recovered, she shall have aid of him in reversion. 42 Aff. 22. adjudged.]

Fitzh. Affise, pl. 349. cites S. C.



[25. If land be limited by fine to J. S. for life, the remainder to another in tail or in fee, and J. S. recovers in *scire facias* against the tenant by default, and the tenant brings a writ of error against J. S. he shall not have aid of him in remainder, because this writ is brought to reverse a judgment after the estate limited; to which judgment J. S. was only party. 20 E. 3. Aid 29. adjudged.]

[26. In a writ of *scire facias* to execute a judgment given in a writ of nuisance against J. for the levying a gorce. Where it was adjudged that this should be abated, though this *scire facias* be only to execute the judgment, yet the defendant being lessee for life, shall have aid of J. S. in reversion. 33 E. 3. Aid del Roy, 107. adjudged.]

So in *scire facias* upon a recovery in writ of annuity, the defendant shall have aid of the patron and ordinary, and yet effoin does not lie for the patron and ordinary at the day of summons ad auxiliandum by reason of the stat. of W. 2. cap. 45, which ousts delays in *scire facias*. Br. Aid, pl. 107. cites 39 H. 6. 50.

[27. If a man recovers in an *ejectione firmæ* against J. S. who dies, in a *scire facias* against his heir, the heir shall have aid of him under whose title his ancestor claimed. Pasch. 3 Jac. B. R. between CARTER AND CLAYPOOLE adjudged.]

[28. In a writ of partition between two coparceners no aid lies, because nothing is demanded thereby but a partition. H. 37. El. B. Curia.] (L) pl. 28

[29. So in a writ of partition between two tenants in common (by the statute) no aid lies no more than in partition between coparceners. H. 37 El. B. Curia.] (L) pl. 30

30. In mortdancestor the tenant vouched J. who entered and prayed aid of A. one of the demandants, and shewed cause, and prayed that the parol demur for his nonage; and by 3 of the justices, if the parol demurs it shall demur for the whole; for assise of mortdancestor shall not be taken by parcels, by which he, of whom the aid was prayed, was summoned and severed, and was nonsuited, and the aid counterpleaded for the other two parts. Quod nota bene. Br. Age, pl. 39. cites 40. Aff. 37.

31. In quo warranto he claimed a leet in his manor of D. The defendant said that he held the manor of the lease of P. for life, and prayed aid of him, and had it, and yet he might have vouched P. Br. Quo Warranto, pl. 1. cites It. Nott. fol. 2.

Br. Aid, pl. 149. cites

[203]

S. C. that aid was

granted of him in reversion.—In quo warranto a man shall have aid, and vouch. Br. Franchises, pl. 26. cites 20 E. 4. 5. by Briggs.

## (B) In what Cases it lies, in respect of the Thing demanded.

Fol. 163.

[1. IN a replevin, if the defendant avows upon a stranger for a rent-service, the plaintiff, being his lessee for life, shall have aid of him, because he can plead only hors de son fee, without the other. 22 H. 6. 34.]

In replevin the defendant avowed upon a stranger.

The plaintiff.

Aid that he held certain land for life, of which the land where he avows is parcel, the reversion to another stranger.

*Stranger*, and prayed aid of him, and had it; for he cannot charge the land which he holds, and it may be that the prayee, when he comes, may abate the avowry, and compel him to avow upon him for the services, as by tender of the services, by reason of the feoffment made to him, or in other manner, &c. Trin. 7 H. 4. 18. b. pl. 21.—Br. Aid, pl. 42. cites S. C.

In replevin after avowry upon a stranger to the replevin [for homage, fealty, and rent-service, &c.] the plaintiff, who was a stranger to the avowry, said that the baron and feme, upon whom the avowry was made, leased to him, for term of life, and prayed aid of them, and well, per curiam. Br. Aid, pl. 31. cites 44 E. 3. 41.

In replevin in avowry, or in consueance for a rent-charge, the tenant for life of the land of the plaintiff in the replevin had aid of the lessor. Br. Aid, pl. 87. cites 22 H. 6. 41.

So where the avowry was upon him in reversion for rent service, where the tenant for life is a stranger to the avowry; for though in a rent-charge the tenant may plead in discharge of the land, yet if the chargee releases to him in reversion, the tenant for life cannot plead this without having the deed, by which he had the aid. Ibid.

\* Fitzh.

Aid, pl. 74.

cites S. C.

and per-

haps the

prayee may

discharge

all the land.

—

† S. P.

Though

the avowry

was for

a rent-charge,

and made

upon no

person

certain,

and notwithstanding

that the

intire

manor

was

charged,

and that 3

acres

only,

parcel

thereof,

were

charged. Br.

Aid, pl. 86.

cites 22

H. 6. 33.

† Ibid.

pl. 128.

cites 6

E. 4. 3.

S. P.

per cur.

without

privity;

for avowry

for a

rent-charge

is

not

made

upon

any

person

certain. Quære

of

rent-service,

and therefore

there

shall

be

[ 2. So in an avowry for a rent-charge, the plaintiff being lessee for life, shall have aid of him in reversion for the feebleness of his estate to plead in discharge of the land. \* 22 H. 6. 33. b. adjudged, 41. † 6 E. 4. 3. Contra || 8 E. 4. 23.]

— † S. P. Though the avowry was for a rent-charge, and made upon no person certain, and notwithstanding that the intire manor was charged, and that 3 acres only, parcel thereof, were charged. Br. Aid, pl. 86. cites 22 H. 6. 33.

† Ibid. pl. 128. cites 6 E. 4. 3. S. P. per cur. without privity; for avowry for a rent-charge is not made upon any person certain. Quære of rent-service, and therefore there shall be privity. Brooke says, but it seems all one at this day, if he avows upon the land for rent-service, by the statute 21 H. 8.—Fitzh. Aid, pl. 87. cites S. C.

‡ Fitzh. Aid, pl. 91. cites S. E. 4. 33.

[ 3. So in an avowry for a rent-charge, if the plaintiff says he hath nothing in the land, but in the right of his wife, he shall have aid of his wife. 13 H. 4. Aid 176. adjudged.]

[ 4. If a writ be brought against another to demand a rent, the defendant, being lessee for life, shall have aid of him in reversion. 8 R. 2. Aid del Roy, 114. Curia.]

[ 5. In a writ of entry sur disseisin of a rent, the tenant, being lessee for life of the land, shall have aid of him in reversion, 12 R. 2. Aid 124. adjudged, who leased to him the land discharged.]

[ 6. The same law in a scire facias out of a fine to execute a rent. 13 R. 2. Aid 126. adjudged.]

[ 7. In a scire facias out of a fine of a rent-charge, the tenant being lessee for life of the land, out of which this issues, shall have aid of him in reversion. 13 R. 2. Aid 126.]

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[ 8. The same law is of a rent-service. 13 R. 2. Aid 126. per Richel.]

[ 9. In an avowry for a rent granted for equality of partition, the lessee for life of the land, whence this issues, shall have aid of him in reversion. 17 E. 3. 33. b.]

See (Q)

pl. 19. S. C.

[ 10. In a scire facias to execute a recognizance against the tertenant, who is but tenant for life, he shall have aid of the heir of the recognizor in reversion; for although if the plaintiff recover, this shall not bind the reversion, yet he may be disturbed of his possession after the death of the lessee, which will be a damage to him, and he in reversion may have a release or acquittal to discharge the execution, which the lessee hath not. 8 R. 2. Aid del Roy 114. But there by the judgment he was ousted of aid, it seems because

he in reversion was party to the writ; but it is not mentioned wherefore the judgment was.]

[11. In a *formedon of a rent*, one *coparcener* shall have aid of the other. 8 R. 2. Aid del Roy 115. adjudged.]

(C) In what Cases it shall be granted, contrary to the *Supposal of the Writ*.

[1. *N trespass* for land in one vill, if the defendant says that it is in another vill, and shews the cause of aid, yet he shall have it, though contrary to the supposal. 45 E. 3. 3.] Br. Aid del Roy, pl. 16. cites S. C.—Fitzh. Aid de Roy, pl. 56. cites S. C.

[2. The same law in an *assise*, without taking the assise in what vill the tenements are. 45 E. 3. 3.] Br. Aid del Roy, pl. 16. cites S. C.—Fitzh. Aid de Roy, pl. 56. cites S. C.

[3. In a writ of *entry sur disseisin of a rent*, the tenant being *lessee for life of the land out of which, &c.* shall have aid of him in reversion. 12 R. 2. Aid 124. adjudged.]

[4. In an *assise* the tenant shall not have aid of one who is a stranger to the supposal of the writ. \* 14 H. 6. 22. b. † 9 H. 5. 13. b.] \* Br. Aid, pl. 100. cites S. C. by Candish, obiter. † Fitzh. pl. 101. cites S. C.

[5. In a writ of *entry in nature of an assise*, if the tenant says he holds for life, the reversion to N. who is a stranger to the supposal of the writ, yet he shall have aid of him. \* 14 H. 6. 22. b. Curia. 21 E. 4. 15. b. 50 b. 12 R. 2. Aid 122. admitted: Contra 2 E. 3. 63. adjudged.] Fol. 164. \* Br. Aid, pl. 100. cites S. C.—S. P. by all the Fitzh. Aid,

Cour. Br. Aid, pl. 100. cites S. C. pl. 94. cites S. C.

† S. P. ibid. pl. 137. cites S. C. —

[6. So in a writ of entry in nature of an *assise against a parson*, he shall have aid of the *patron and ordinary*, because it is contrary to the supposal of the writ, though he claims but an estate for life, and says that the reversion is over to the bishop, who is patron and ordinary. 9 H. 5. 13. b. adjudged.] Fitzh. Aid, pl. 101. cites S. C.

[7. In a writ of *entry of a disseisin to his father against a parson or vicar*, if the tenant says he found the vicarage seised, he shall have aid of the patron and ordinary, for he shall not be ousted of his aid by a false supposal. 21 E. 3. 55. b.] Fitzh. Aid, [205] pl. 55. & 182. cites S. C.

[8. But otherwise it is if he found not the vicarage seised, for there he shall not have aid against the supposal of the writ. \* 21 E. 3. 55. b. † 22 E. 3. 9. b.] \* Fitzh. Aid, pl. 55. & pl. 182. cites S. C.—

† Fitzh. Aid, pl. 4. cites S. C.

[9. But if he says that his predecessor died seised, and that the ancestor of whose seisin the demandant demands in the time of vacation abated, and of such estate continued seised till he himself was parson,

parson, and be entered, &c. he shall have aid. 22 E. 3. 9. b. adjudged.]

Fitzh. Aid,  
pl. 140.  
cites Pasch.  
28 E. 3.  
S. P. and  
seems to be  
S. C. and  
that Roll is misprinted.

[ 10. In a *cui in vita*, supposing the entry of the tenant by J. to whom the baron leased, &c. if the tenant says that R. leased this to him for life, and prays in aid of J. N. his heir, to whom the reversion does now belong, he shall have it, though this be against the supposal of the writ. 18 E. 3. Aid 149. adjudged.]

Fitzh. Aid,  
pl. 5. cites  
S. C.

[ 11. [So] in a *cui in vita* where the entry of the tenant is supposed by the husband, if the tenant says that A. leased to him for life, and granted the reversion to B. to which he attorned, he shall have aid of B. though it be against the supposal of the writ, for he does not plead this in abatement of the writ. 22 E. 3. 17. adjudged.]

[ 12. In a writ of entry *sur disseisin* done to his father, supposing the entry of the tenant by B. who disseised, &c. the tenant may say that R. leased to him for life, and pray in aid of him, [in this case] he shall have it, though this be contrary to the supposal of the writ. Contra, 20 E. 3. Aid 31.]

I cannot  
find this in  
the year-  
books

[ 13. [So] in a writ of entry *sur disseisin* of a *disseisin* done to his father by the tenant, if the tenant says that he is lessee, &c. the reversion to J. S. he shall have aid of him, though it be against the supposal of the writ. 9 H. 5. 14. said to be adjudged before Thuring in 11 R. 2. 11 R. 2. Aid adjudged, per Belknap.]

[ 14. In a *formedon* of a gift made by E. 3. if the defendant shews a gift made by E. 2. the father of E. 3. and so conveys it to her and other coparceners, and that partition is made between them, she shall have aid of her coparceners, though the plea is contrary to the supposal of the writ, for the court shall grant it though the plaintiff himself cannot without abating his writ. 29 E. 3. 28. b. adjudged.]

[ 15. In a writ of *dower* against 2, they may say that they are coparceners, &c. and made partition, and one shall have aid of the other, though the writ supposes them jointenants. 39 E. 3. 4. b. adjudged.]

[ 16. In a *dum fuit infra ætatem* in the *per & cui* the tenant shall have aid out of the line. 34 E. 3. Aid 165. adjudged.]

Fol. 165.

[ 17. In a writ of entry within the degrees, if the tenant prays in aid of a stranger who is not named in the writ, the court shall grant it ex officio, though the demandant cannot grant it for abating his writ. 35 E. 3. Aid 166.]

18. *Cessavit* that the tenant held of him and cessed, the tenant said that J. S. was seised in fee, and leased to him for life, and prayed aid of him, and had it by award, though it be in a manner contrary to the supposal of the writ that he held of the demandant. Br. Aid, pl. 119. cites 9 H. 7. 15.

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19. But in *waste* the tenant said that a stranger leased the land to him for life, and prayed aid, he shall not have it, for this is contrary to the supposal of the writ. Ibid.

**(D) In what Cases it lies contrary to the Supposal of an Avowry.**

[1. **I** F in a replevin brought by lessee for years an avowry be made upon a stranger, and the lessee says that one J. S. was and yet is seised in fee, and holds it of the defendant by certain services, he shall have aid of the lessor, because without the lessor he cannot plead this matter in abatement of the avowry. Co. 9. Avowry, 20. b. Resolved, 17 E. 3. 6. b. \* 18 E. 3. 7.]

\* Fitzh. Aid, pl. 139. cites S. C.—  
In avowry upon a stranger for relief, the plaintiff said that he held for term

of his life of the lease of this stranger, and prayed aid of him, and had it. Fitzh. Aid, pl. 133. cites Hill. 17 E. 3. 9.

[2. But upon a general allegation that his lessor was seised in fee and leased to him for life or years, he shall not have aid, because for any thing that appears this is but hors de son fee, which he himself may plead without aid. Co. 9. Avowry, 20. b. 18 E. 3. 7. adjudged.]

Fitzh. Aid, pl. 139. cites S. C.

[3. In a replevin, if the defendant avows upon J. S. as upon his very tenant, and the plaintiff says that A. was seised in fee, and gave to J. in tail the remainder over, which J. leased to the plaintiff for years, the plaintiff shall have aid of J. though this plea goes in the abatement of the avowry, for his false supposal shall not oust him thereof. 2 H. 7. 10. b. 11. adjudged.]

S. P. by the opinion of Keble and Brian; for it may be that the avowry be false and the

aid prayer true. Quære. Br. Aid, pl. 117. cites S. C.—Fitzh. Aid, pl. 95. cites S. C.

[4. So if the defendant avows upon two strangers, where he ought to avow upon three, the plaintiff being lessee for years shall have aid of them, though this be contrary to the supposal of the avowry. 19 E. 4. 9. b. Quære.]

[5. In a replevin, if the defendant avows upon F. as his very tenant, and the plaintiff says that F. gave the land by fine to G. which G. leased to him for years, he shall have aid of G. (nota, the avowry is changed by the fine without notice.) 5 H. 5. 5. adjudged.]

Br. Aid, pl. 58. cites S. C.—  
Fitzh. Aid, pl. 119. cites S. C.—

In replevin, the defendant avowed upon A. B. as upon his very tenant, and the plaintiff said that N. W. was seised in fee, and leased to him for term of years, and prayed aid of him, and could not have it; for N. W. is a stranger to the avowry by which the plaintiff said that the same A. B. upon whom the defendant avowed, made a feoffment to the said N. W. who gave notice to the defendant, &c. and after leased to him for years, and prayed aid of him. And per tot. cur. he shall not have aid, because he is yet a stranger to the avowry; Quod nota. Br. Aid, pl. 8. cites 3 H. 6. 54.

[6. In a replevin, if the defendant avows upon a stranger the plaintiff may say that he was jointly infeoffed with his wife to hold of the chief lord, and shall have aid of his wife, though this be against the supposal of the avowry. 2 E. 2. Aid 159.]

7. At common law no aid was grantable of a stranger to an avowry, because the avowry was made of a certain person; but now by the statute 21 H. 8. the lord need not avow for any rent or service upon any person certain, and consequently in an avowry, according to that act, aid shall be granted of any man. Co. Litt. 312. a.

(E) In what Cases it shall be granted. Where Title is derived out of the Party himself.

Fitzh. Aid  
de Roy, pl.  
59. cites

S. C.—Br. Aid del Roy, pl. 19. cites S. C.—But for the point of the case in those books, see Aid of the King (C) pl. 1.

[ 1. **W**HERE title is derived from the lessee for life, being defendant, he shall not have aid of the lessor. 48 E. 3. 18.]

(F) In what Cases it lies.

\* Fitzh.  
Aid, pl. 44.  
cites S. C.

[ 1. **L**ESSEE for life shall have aid of him in reversion though he may vouch him. 18 E. 3. 8. adjudged. Contra, \* 30 E. 3. 26. b. adjudged. Contra 45 E. 3. Aid 118. adjudged.]

2. If it can appear that he who prays in aid may vouch, he is always ousted of the aid and put to the voucher, except the tenant by the curtesy, who may pray in aid but cannot vouch. Per Markham, quod non negatur. Br. Voucher, pl. 73. cites Tempore R. 2.

3. If a man distrains, &c. in his own name, and after makes comsance as bailiff, he shall not have aid of the lord. F. N. B. 118. (B.) in the new notes there (a) cites 7 H. 4. 34.

4. Where a reversion for years comes to the lord by escheat or by alienation in mortmain, or by claim, for purchase of his villein, the lessee shall have aid without privity. Br. Aid, pl. 118. cites 8 H. 7. 8. per Keble, Fisher, and Jay.

5. And where a man by testament devises that his executors shall make a lease for years, which they do, the lessee shall have aid of him in reversion without other privity. Ibid.

6. And if guardian endows the feme, she shall have aid of the heir. Ibid.

(G) Upon what Plea it shall be granted.

Præcipe quod reddat, the tenant said that J. leased to him for life, and after acknowledged by J. all his

right in the tenements to be the right of B. come coo, &c. and prayed aid of him, and the opinion of the court was, that he shall have aid, for such fine is good of the reversion, because all his right after the lease is the reversion, and therefore reversion passed, and the aid prayer of the comtee amounted to an attornment, therefore he shall have aid, per tot. cur. Br. Aid, pl. 97. cites 37 H. 6. 5.

Fol. 166.

See (P) pl.  
S. C.

[ 1. **I**N a scire facias to execute a fine levied of the manor of B. if the defendant says that the land for which he is warned is part of another manor of which he is seised for life, upon this plea he shall not have aid of the reversion, because this plea amounts to this that it is not comprised within the fine which goes to the action. 18 E. 3. 24. b. adjudged.]

[ 2. In replevin, if the defendant acknowledges the taking as bailiff to J. S. as in his several, if the plaintiff claims common appendant there,



there, which is in the right, yet the bailiff shall not have aid of his master. 39 E. 3. 27. adjudged.]

3. *Trespass* [of false imprisonment,] the defendant justified taking the plaintiff as villein of his master regardant to his manor of B. in another county, and prayed aid of his master, and could not have it, but after they were at issue if he was born within the espousals between his father and mother or not, and then prayed aid, and had it, &c. Br. Aid, pl. 62. cites 38 E. 3. 34.

4. In *replevin* the defendant avowed for a rent-charge, the plaintiff replied that he held jointly with J. N. of the feoffment of W. N. and shewed deed, and prayed aid of him, and was ousted of the aid by award. Br. Aid, pl. 104. cites 1 H. 6. 6.

5. In *annuity* per Danby, Prisot, and others, anno 30 H. 6. parson shall have aid of patron without cause shewn, otherwise than to say that B. was seised of the manor of D. to which the advowson was appendant, and presented him, and that he found the church discharged, &c. and prayed aid, and the cause is not traversable where he shews cause, as it shall be where land is demanded against tenant for life, for he shall shew cause, and the cause is traversable of the aid, and not in writ of annuity. Note the diversity. Br. Aid, pl. 89. cites 22 H. 6. 47.

6. In *replevin* the defendant avowed upon N. as upon his very tenant for rent, the plaintiff said that N. enfeoffed P. who was seised in fee, and leased to the plaintiff for 40 years, and prayed aid of P. & Curia contra eum, because P. was a stranger to the avowry, and therefore he said further, that P. gave notice to the lord, now defendant, and prayed aid of P. and the whole court was with him, by which they granted the aid gratis to the plaintiff; Quod nota. Br. Aid, pl. 121. cites 5 E. 4. 106.

## (H) Upon what Issue it lies.

[1.] In *ejectment* of ward of J. S. the heir of J. D. who held of him by homage, &c. if the defendant says, that A. was seised in fee, and leased this to J. D. for life, the remainder to P. and he entered as bailiff to P. after the death of J. D. and upon this plea issue is joined, whether J. D. was seised for life or in fee, the defendant shall have aid of P. because his estate will come in question; for if J. D. had a fee, his estate is gone. 21 E. 3. 22. b.]

Fitzh. Aid, pl. 54. cites S. C. See (P) pl. 5. S. C. In *ejectione firme*, where the title of him in reversion is not disclosed

in pleading, nor comes in question, aid shall not be granted; per Broker, Prothonetary. Owen 43. 25 Eliz. Anon.

[2. In *trespass* of cutting of certain trees, if the defendant justifies for common of estovers as lessee for years of J. S. by title of prescription, if issue be taken whether he cut them of his own wrong, or for the cause aforesaid, the defendant shall not have aid of the plaintiff, because the issue is all in the personalty, (and the prescription is acknowledged.) 21 E. 3. 41. adjudged.]

Br. Aid, pl. 68. cites S. C.

Br. Aid, pl.  
68. cites  
S. C.

[3. ~~But if issue~~ had been taken upon the right of eschever he should have had aid. 21 E. 3. 41.]

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[4. In a replevin, if the defendant as lessee for life avows for a rent-services, and the plaintiff pleads hors de son fée, upon which they are at issue, the defendant shall have aid of him in reversion, though he in reversion may distrain after the death of the defendant, although this be now found against the defendant. 29 E. 3. 40. adjudged.]

[5. So if an avowry be upon the husband plaintiff in replevin, as in the right of his wife for services, and the plaintiff pleads hors de son fée, and issue thereupon joined, the husband shall have aid of his wife. 29 E. 3. 24. adjudged.]

[6. [So] in replevin by the baron, if the defendant avows by reason of a lease for life made to the baron and feme rendering rent, and for rent arrear avows, &c. the baron shall have aid of the feme. 38 E. 3. 6.]

\* Fitzh.  
Aid, pl. 11.  
cites S. C.

[7. In trespass for beating his servant, if the defendant justifies because the servant was his villein in right of his wife, to which the plaintiff says he was not his villein at the time of the battery, upon which they are at issue, the husband shall not have aid of the wife; because the issue is taken between strangers upon a trespass only. 28 E. 3. 98. b. adjudged. \* 27 E. 3. 89. b.]

See (P) pl.  
7. S. C.

[8. In an action upon the statute for taking averia carucae where there were others sufficient, if the defendant acknowledges the taking as bailiff to J. S. for rent, absque hoc that there were other sufficient cattle, and issue is taken upon this, the bailiff shall not have aid of his master, because by this issue the seignior is not in question. 15 H. 6. Aid 72. adjudged.]

See (P) pl.  
8. S. P. and  
intends S. C.

[9. The same law if in replevin he pleads non cepit. 15 H. 6. Aid 72. per Jenny.]

but is misprinted there (14) instead of (15) and the word (Aid) omitted.

10. In trespass the defendant said that the place where, &c. is the franktenement of his brother, who leased to him, judgment si Actio. Horton said, our franktenement, prist, and the other e contra; and the defendant prayed aid of the lessor, and had it. Br. Aid, pl. 39. cites 7 H. 4. 4.

Fol. 167.

## (I) What Persons shall have Aid, in respect of their Estates.

Br. Aid, pl.  
3. cites S. C.  
—Ibid. pl.  
7. cites S. C.  
For it was  
said that

[1. IF there are 2 jointenants in fee, and one is impleaded, he shall not have aid of his companion, because one hath as \* high an estate as the other, and hath power to plead any plea in discharge of the land as well as the other. 2 H. 6 7.]

one tenant of fee-simple may not have aid of another, unless in case of coparceners to recover pro rata, or to have the voucher for the warranty paramount. — Br. Jointenancy, pl. 2. cites S. C. — Fitzh. Aid, pl. 51. cites 2 H. 4. 6. 7. S. P. and seems to intend S. C. — S. P. and also the other is at no mischief; for he shall not be concluded by the plea of his companion, but may falsify in another action. Br. Aid, pl. 143. cites 22 E. 4. 2. — Br. Aid, pl. 106. cites 39 H. 4. 35. S. P.

[2. So if 2 jointenants in fee make partition, and one is impleaded, he shall not have aid of the other at the common law; for the warranty was destroyed by the partition. Contra 2 H. 6. 7. b.]

31 H. 6. top.  
2. f. 3. on-  
acts, that  
jointenants  
and tenants  
in common,

and their heirs, after partition made, shall have aid of the other, or of their heirs, to derive the warranty paramount, and so recover pro rata, as is used between coparceners by the course of the common law after partition made.

[3. If the tenant brings a replevin against the lord paramount, and he avows upon him as his tenant, and he pleads in abatement of the avowry that he holds of the mesne, and the mesne of the avowant, he shall have aid of the mesne, because perhaps the mesne hath a matter of estoppel against him. 9 H. 6. 27.]

[210]  
See (1.2) pl.  
2. S. C.—  
Fitzh. Re-  
plevin, pl. 4.  
cites S. C.

[4. Tenant in tail shall not have aid of him in remainder in fee; for he himself hath an inheritance. 2 E. 3. 46. b. adjudged.]

Tenant in  
tail shall  
have aid of  
20. and 38

the queen, but not of a common person. Arg. Cro. E. 417. pl. 12. cites 10 H. 7. E. 3. 14.

[5. Tenant after possibility shall not have aid, \* 2 H. 4. 17. b. adjudged. and 61. b. 11 H. 4. 15. 8 H. 6. 25. 10 H. 6. 1. 8. adjudged, for the inheritance that was once in him. 39 E. 3. 16. adjudged. 31 E. 3. Aid 35. adjudged.]

\* S. P. But  
he in re-  
mainder  
shall be re-  
ceived in his  
default. Br.

Aid, pl. 37. cites 2 H. 4. 16.—Co. Litt. 27. b. S. P.—Le. 291. pl. 397. Arg. S. P. but says that his grantee shall have it.

[6. Lessee for life, the remainder in tail, the remainder in fee to himself, shall have aid of the remainder in tail. 41 E. 3. 16. b.]

See (K) pl.  
3. S. C.—  
S. P. not-  
withstand-

ing he himself had the fee. Quod nota. Br. Aid, pl. 23. cites S. C.—Fitzh. Aid, pl. 111. cites S. C. accordingly, after great debate.

[7. If lessee for life of a seignior avows in replevin, he shall have aid. 9 H. 6. 26. b. of the reversioner.]

Br. Aid, pl.  
10. cites  
S. C. but

this matter ought to appear in the avowry; for otherwise he has not shewn cause to pray in aid upon his avowry.

[8. Lessee for years shall have aid in an avowry for a rent-service. \* 45 E. 3. 8. † 6 E. 4. 2. b.]

\* Br. Join-  
der in Aid,  
pl. 5. cites

Pasch. 45 E. 3. 7. S. C.—Fitzh. Joinder en Aid, pl. 9. cites S. C. † Br. Aid, pl. 128. cites S. C.

So in avowry for a rent-charge as well as for rent-service, and yet the avowry is not made upon any person in certain. Br. Aid, pl. 106. cites 39 H. 6. 35. per cur.

[9. So in trespass lessee for years shall have aid. \* 11 H. 4. 90. † 6 E. 4. 2. b. being defendant, adjudged.]

\* Br. Aid  
pl. 53. cites  
S. C. & S. P.

per Culpepper, after his term ended.—Fitzh. Aid, pl. 105. cites S. C. † Br. Aid, pl. 127. cites S. C. accordingly, but contra if he is plaintiff.

[10. Lessee for years shall have aid in trespass for fishing in a piscary. 46 E. 3. 11.]

[11. Tenant at will shall have aid. \* 7 H. 4. 31. b. † 4 E. 4. 14. b. adjudged. Dubitatur 2 H. 4. 25. Contra † 11 H. 4. 90. adjudged. Contra 27 E. 3. 88. † 12 E. 4. 5. adjudged.]

\* Br. Aid,  
pl. 43. cites  
S. C.—

Ibid. pl. 53.  
cites S. C.

accordingly, that he shall not have aid; for he has no interest certain to lose, by the opinion there.

† Br. Aid, pl. 122. cites S. C. that he had the aid; for the issue is upon the franktenement, which tenant at will cannot try without aid of the tenant of the franktenement.——Fitzh. Aid, pl. 85. cites S. C.      † Br. Tenant per Copie, pl. 3. cites S. C.——Fitzh. Aid, pl. 105. cites S. C. but that he was ousted, he praying it after issue joined.

¶ In replevin the defendant avowed upon a stranger; the plaintiff shewed that this stranger leased to him at will. Awarded that he shall not have aid. Fitzh. Aid. pl. 93. cites S. C.——Br. Aid, pl. 135. cites S. C. accordingly.——S. P. accordingly, Br. Aid, pl. 139. cites 10 H. 6. 27.

\* Br. Aid, pl. 26. cites S. C.—— [ 12. If an *avowry* be upon baron and feme, after issue had for homage in the right of the feme, the baron shall have aid of the feme. \* 43 E. 3. 13. in a replevin brought by the husband. pl. 114, † 35 H. 6. 10. adjudged.]  
cites S. C.

† Br. Joinder in Aid, pl. 9. cites S. C.——Fitzh. Aid, pl. 82. cites S. C.——Br. Aid, pl. 17. cites S. C.——See pl. 13. S. C.

[ 211 ] [ 13. [So] in an *avowry* upon baron and feme, for rent issuing out of the land of the feme, the baron, plaintiff shall have aid of his feme. 46 E. 3. 11. \* 9 H. 6. 26. b. † 35 H. 6. 10. adjudged.]  
\* So if the avowry is made by baron and

feme, for the right of his feme; but this matter ought to appear in the avowry; for otherwise he has not shewn cause to pray in aid upon his avowry. Br. Aid, pl. 10. cites S. C.

† Br. Joinder in Aid, pl. 9. cites S. C. but mentions nothing of the rent, or what the avowry was for.——Fitzh. Aid, pl. 82. cites S. C. that it was made in right of the feme, but says not for what.——Br. Aid, pl. 17. cites S. C.

[ 14. If the baron justifies the imprisonment of his wife's villein during coverture, after the death of the feme he shall have aid of the heir. 11 H. 4. 90.]

[ 15. In an *avowry* upon the baron for services due in right of the feme, he shall have aid of the feme. 39 E. 3. 15.]

[ 16. In an *avowry*, lessee for life shall have aid of the reversion. 17 E. 3. 33. b.]

Tenant in dower shall have aid of him in reversion. Br. Quo Warranto, pl. 1. cites It. Not. fo. 2.  
[ 17. So tenant in dower in a replevin shall have aid of him in remainder upon whom the avowry is. 15 E. 3. Aid 33. adjudged.]

Ow. 28, 29. Arg. takes a difference between a tenant at will and a tenant at sufferance; that a tenant at will shall have aid, but that tenant at sufferance shall not; and cites 2 H. 4.——2 Le. 47. pl. 59. Arg. S. P. cites 11 H. 4.——See pl. 11. and see (L) pl. 9. 10.  
[ 18. If lessee for years holds over his term he shall have aid of the lessor. 11 H. 4. 90. b.]

\* Br. Aid, pl. 65, cites S. C.—— [ 19. In a real action tenant by the curtesy shall have aid of the reversioner for the feebleness of his estate. \* 21 E. 3. 14. b. 26 E. 3. 69.]  
Fitzh. Aid, pl. 21. cites S. C.——See (E. a) pl. 5. S. C.——See (F) pl. 2.

Fol. 168. [ 20. In an *attaint* against the wife of him who recovered, being tenant in dower, she shall have aid of him in reversion for the weakness of her estate. 40 Ass. 20. adjudged.]  
See (A) pl. 12. and 14. S. C.——Fitzh. Aid, pl. 158. cites S. C.

[21. If 2 *executors have a term* one shall have aid of the other, because one alone cannot have aid of the lessor. 11 H. 4. 63. b.] Br. Aid, pl. 49. cites S. C. ———  
Fitzh. Aid, pl. 804. cites S. C. ——— See (O) pl. 3. S. C.

[22. So if a man *justifies as jointenant for life* with another, he shall have aid of him. 11 H. 4. 63. b.] Br. Aid, pl. 49. cites S. C. thus,  
viz. 3 jointenants are for life, trespass is brought against the one, he shall justify as the frank-tenement of him and his companions, and they 3 shall have aid of him in reversion. Per Skrene,

[23. In a *rationabilibus divisis against lessee for life*, he shall have aid of him in reversion; for this is a writ of right. 14 E. 3. Aid 23. adjudged.]

[24. The *same law in a writ of admeasurement of pasture*, 14 E. 3. Aid 23. per Shard.]

[25. If a man *gives the vesture of his land*, and he cuts and carries it, and a *stranger brings trespass against him*, he shall not have aid of the donor, because he has not an estate, but by carrying he hath the effect of his gift. 11 H. 4. 90.]

26. It was said for law that *tenant for life may choose whether he will vouch or pray in aid of him in reversion*. Br. Aid, pl. 9. cites 9 H. 6. 3. [212]

**(K) Of whom.**

[1. IF there be *tenant for life*, the *remainder in tail*, the *remainder in tail*, the *reversion in fee*, and the *reversion descends upon the last remainder*, and after the lessee is impleaded, he shall have aid of all. \* 40 E. 3. 13.] \* Br. Aid, pl. 19. cites S. C. ———  
Fitzh. Age, pl. 28. cites S. C. ———

So of lease for life, remainder in tail, the remainder in fee, the lessee shall have aid of the 2 several remainders at one instant. Br. Aid, pl. 134. cites 12 E. 4. 3. ——— And was not suffered to have aid of one without praying aid of both. Br. Aid, pl. 38. cites 7 H. 4. 2.

[2. If there be *tenant in tail*, the *reversion in fee to himself*, he shall not have aid of himself. 40 E. 3. 13.]

[3. But if there be *tenant for life*, the *remainder in tail*, the *remainder in fee to the lessee*, the lessee shall have aid of the remainder in tail. \* 41 E. 3. 16. b. and there he prays it only of him. 42 E. 3. 8. b. But the reason is given, because the *fee is not in himself till the tail spent*.] \* Br. Aid, pl. 23. cites S. C. ———  
Fitzh. Aid, pl. 111. cites S. C. ———  
See (I) pl. 6. S. C.

[4. *Feme lessee takes the reversioner in fee to husband*, and after writ is brought against them, *she shall not have aid of the husband*. 41 E. 3. 17.]

[5. If there be *lessee for life*, the *remainder in tail to J. S.* and after the *reversion in fee descends upon J. S.* also, the lessee shall have aid of him. Contra 21 E. 3. 55. b. adjudged; but quære.]

[6. A *parson shall not have aid of himself, being patron*. 7 H. 6. 41.] Br. Counterplea de Aid, pl. 10. cites S. C.

[7. Lessee

S.P.Br.Aid, pl. 51. cites 11 H. 4. 74. — Fitzh. [7. Lessee for life shall have aid of the right heir of J. S. who hath the remainder limited by such name, and he having this by purchase. 11 H. 74.]

Aid, pl. 25. cites Trin. 11 H. 4. 74. S. P. and seems to be the case intended by Roll.

[8. If there be lessee for life, the reversion after possibility to J. S. the remainder to the right heirs of J. S. lessee shall have aid of J. S. 17 E. 3. 43. b. adjudged.]

[9. If there be lessee for life, the remainder in fee to another, the lessee shall have aid of him in remainder; for he hath a present estate vested. 26 E. 3. 69. b. adjudged. Contra 29 E. 3. 9. adjudged.]

• Ow. 137. cites S. C. as resolved that tenant for life shall have aid of the reversioner for life. But Fitzh. Aid, pl. 32. which cites the S. C. is that by Shard. the aid is not grantable.

A. granted to B. for life, [remainder to C. for life,] the reversion to A. A formedon is brought against B. who prayed in aid of C. without praying it of A. All the justices, præter Warburton, held that B. should not have the aid of C. because B. hath as high an estate as C. and may plead all that C. may; but if B. was tenant for life, the remainder to C. in tail, there he shall have aid of C. the tenant in tail. Ow. 137. Trin. 10 Jac. Barnes's case.

If A. be tenant for life, the remainder to B. for life, the remainder to C. in fee; A. shall have aid of B. and C. For otherwise he in remainder shall not come in to plead. Ow. 137. per cur. cites 23 H. 6. 6. 11 E. 3. 16.

11. Not of him who is estopped to maintain the issue.

[12. [As] if a replevin be against three, and one denies the taking, and the other confesses the taking, as bailiffs of him who denied it, for damage feasant, they shall not have aid of him; for he cannot maintain the taking which he hath denied. 42 E. 3. 6. b. + 22 H. 6. 53. 19 E. 3. Aid 27. adjudged. Quare 18 E. 3. 53. b.]

See (P) pl. 4. S. C. — + S. P. by the Reporter; but dubitavit. Br. Aid, pl. 90. cites 22 H. 6. 53. — See pl. 4. S. C.

## (L) What Person, in respect of his Estate, shall have Aid.

[1. **I**N a *juris utrum* against lessee for life, he shall have aid of him in reversion. 13 H. 4. Aid 177. adjudged.]

[2. [So] in a *formedon* against lessee for life, he shall have aid of him in reversion. 33 E. 3. Aid de Roy 106.]

In a writ of partition by one coparcener against tenant by the curtesy of the other coparcener who is dead, he prayed aid, and had it, though the land shall not be recovered by this action; for the partition shall bind. Br. Aid, pl. 140. cites the Register, 76. — See (A) pl. 28. 25.

[3. In a writ of *partition* brought against tenant by the curtesy, he shall have aid of him in reversion, because the partition falls in the right, though no land is demanded thereby. 5 E. 3. Aid 148.]



[4. In a *replevin*, if the *defendant avows for damage feasant*, and the *plaintiff claims common*, upon which they are at *issue*, the defendant being lessee for life, shall have aid of him in reversion. 19 R. 2. Aid del Roy 113. adjudged.]

[5. In a *replevin* the *plaintiff, lessee for years*, shall have aid of him in reversion, if the *avowry be upon his lessor*, because a return shall be awarded against him, and he without aid cannot plead but hors de son fee, or tantamount. \* 6 E. 4. 2. b. † 5 E. 4. 2. b. though it seems he may join to the prayee. Contra 3 E. 2. Aid 161. adjudged. Contra 8 R. 2. Aid del Roy 118. adjudged.]

\*So Br. Aid, pl. 127. cites 6 E. 4. 2. —

† S. P. by the Reporter. Br. Aid, pl. 126. cites 5 E. 4. 2.

[7. The *same law* in an action of *trespass* by the lessee for years. Contra 8 R. 2. Aid de Roy, 117.]

See (A) pl. 7. S. P.

[8. If there are 2 *coparceners*, and each has *issue a son*, and one *coparcener enfeoffs her son and heir*, and one *J. in fee*, and dies, and the other *coparcener dies*, and her son *leases her part to J. for 10 years*, and *J. leases the land, where the taking was, to the two sons for 8 years*, and the lord *distains*, and the two sons bring a *replevin*, and he *avows upon them*, they shall not have aid of J. upon this matter, because they have a fee, and so their estate not feeble. 34 H. 6. 46. b.]

Fitzh. Aid, pl. 81. cites S. C. — Br. Aid, pl. 16. cites S. C. and that the best opinion was, that he shall not have aid of

the stranger to the avowry, neither shall one termor have aid of another termor in avowry; but if he had prayed aid of him who was party to the avowry, he might have aid of him, and the other might join without process; and if notice was given to the lord by the stranger to the avowry of the feoffment of the coparcener made to him, he might join to the plaintiff and abate the avowry. Br. Aid, pl. 16. cites S. C. per Prisot and Moile. [ 214 ]

[9. *Tenant at will* shall have aid of his lessor for the weakness of his estate.]

See (I) 11. 18. — Tenant at will

shall have aid in replevin. Fitz. Aid, pl. 63. cites 13 H. 6.

[10. *Tenant at will, according to the custom*, shall have aid of the lord, where the right of the *seigniorie comes in question*, by the issue taken. 21 H. 6. 37. adjudged.]

Br. Aid, pl. 82. cites S. C. accordingly. — He shall

have aid of the lord in trespass after issue joined. Br. Tenant by Copy, &c. pl. 4. cites S. C. — Fitzh. Aid de Roy, pl. 23. cites S. C. — Mo. 128. pl. 276. S. P. cites 12 E. 4. 7. and 21 E. 4. — See (K. 2) pl. 11.

11. *He who has fee shall not have aid.* Br. Counterple de Aid, pl. 4. cites 41 E. 3. 37.

**(M) Who shall have Aid. The Baron of the Feme.**

Fol. 170.

[1. ] IN a *replevin* by the baron, if the defendant avows upon J. S. a stranger, the baron may say, that he has nothing in the land, but in the right of his feme as her dower, the reversion to J. S. and shall have aid of his wife, though she is a stranger to the avowry. 19 E. 3. Aid 143.]

So where the baron said that the same stranger leased to his feme for life, and so had

nothing but in right of his wife, and prayed aid of her, and had it, and after they a may pray aid of

of this lessor, and then all of them may plead riens arrear, or disclaim per cur. Br. Aid, pl. 34. cites 22 H. 6. 2 & 3.

2. *Avowry upon W.* because he leased to *W.* and his feme for life rendering rent, &c. by which *W.* prayed aid of his feme, and had it; quod nota. Br. Aid, pl. 60. cites 38 E. 3. 6.

3. If a man brings writ against the baron and feme, and recovers, and the feme dies before execution, there the baron shall not have aid of the heir of the feme, for the estate of his feme by which, &c. is defeated. Br. Aid, pl. 36. cites 2 H. 4. 16. per Breuche.

## (N) Vouchee.

See (U) pl. 124. S. P. [ 1. *A* Bishop that comes in by voucher upon his own warranty, shall have aid of the patron and ordinary.]

[ 215 ]

## (O) Prayee.

Br. Aid, pl. 45. cites S. C. [ 1. ] If the servant justifies in the right of his master, being lessee for life, who joins to him, they both shall have aid of him in reversion. 8 H. 4. 16. b.]

Br. Aid, pl. 45. cites S. C. [ 2. But if the servant prays in aid of the master who comes in by process after issue, he cannot pray in aid, for there shall not be aid upon aid, dubitatur, 8 H. 4. 16. b.]

\* Br. Aid. pl. 49. cites S. C. accordingly.— [ 3. If an executor of the tenant of a term has aid of his companion executor, they both shall have aid of him in reversion. \* 11 H. 4. 63. b. 64. 13 H. 4. Aid 186.]  
Fitzh. Aid, pl. 104. cites S. C.—See (I) pl. 21. S. C.

Br. Aid, pl. 49. cites S. C. per Hank. [ 4. If a baron has aid of his feme lessee for life, they shall have aid of him in reversion. 11 H. 4. 63. b.]

[ 5. So if lessee for life leases for years, and lessee for years hath aid of the lessee for life, they shall have aid of him in reversion. 11 H. 4. 63. b.]

[ 6. If a bailiff of lessee for life has aid of the lessee, the lessee may have aid over of him in reversion. 11 H. 6. 39. b.]

[ 7. Lessee for life shall have aid of the lessor, and the lessor shall after have aid of the king who granted this to him. 26 Ass. 55.]

[ 8. He that is actor in an action shall have aid. 9 H. 6. 56. b.]

[ 9. As the defendant in replevin after avowry is an actor, yet he shall have aid. 9 H. 6. 56. b.]

(P) In what Case a Servant shall have Aid of his Master. Aid by Officers. Servant. Fol. 171.

[1. IN ravishment of ward, the defendant justifies as servant to his master, who is lord by priority, and the priority is traversed, he shall have aid of his master. 7 H. 4. 9. b.]

Fitzh. Aid, pl. 103. cites S. C. but mentions nothing of the priority. — Br. Aid, pl. 40. cites S. C. and mentions the priority.

[2. Otherwise it had been if the other had said, *de injuria sua propria*, &c. 7 H. 4. 9. b.]

Br. Aid, pl. 40. cites S. C. —

[3. In ravishment of ward, the defendant justifies as bailiff of J. S. and makes to him title as guardian by priority, and the defendant traverses the estate by which he should be in ward to J. S. the defendant shall have aid of J. S. 17 E. 3. 25. b.]

[4. In replevin against two, if the one denies the taking, and the other acknowledges it as bailiff to him who hath denied it, he shall not have aid of him because he cannot maintain the taking which he had denied. \* 22 H. 6. 53. † 42 E. 3. 6. b. Fitzh. Quære 18 E. 3. 53.]

\* Br. Aid, pl. 90. cites S. C. by the Reporter; but dubitavit. — Fitzh. Join- pl. 12. S. C.

der en Aide, pl. 8. cites S. C. — (K)

[5. In an ejectment of ward, if the plaintiff says that A. held of him, &c. and died in his homage, &c. and the defendant says that J. was seised in fee thereof, and gave this to A. for life, the remainder to H. in fee, and that after the death of A. he seised the land by the command of H. to which the plaintiff says, that A. was seised in fee, the defendant shall have aid of H. his master, because his estate is to be tried. 21 E. 3. 22. b. adjudged.]

[216] Fitzh. Aid, pl. 54. cites S. C. (H) pl. 1. S. C.

[6. In replevin, if the defendant acknowledges the taking as bailiff to J. S. as in his several, if the plaintiff claims common appendant there, which is in the right, yet the bailiff shall not have aid of his master. 39 E. 3. 27.]

(G) pl. 2. S. C.

[7. In trespass upon the statute for taking averia carucæ, if the defendant says he distrained them as the bailiff of J. S. for rent arrear, &c. *absque hoc* that there were other cattle at the time than those, upon which they are at issue, the bailiff shall not have aid of J. S. because the seigniorship is not in question. 15 H. 6. 72. adjudged.]

(H) pl. 8. S. C. but cites it as 15 H. 6. Aid 72.

[8. In replevin, if the defendant says *non cepit* he shall not have aid. 14 H. 6. 72.]

(H) pl. 9. S. P. cites 15 H. 6.

Aid 72. per Jenny, and it seems that this is misprinted here in Roll, and should be (15) instead of (14)

[9. In trespass, if the defendant justifies as bailiff, because the plaintiff is his master's villein, and the plaintiff says he is free, &c. he shall have aid of his master. 28 E. 3. 98.]

In trespass, bailiff may have aid; for he claims in auter

droit. Br. Aid, pl. 53. cites 11 H. 4. 90. — Ibid. pl. 45. cites 8 H. 4. 17. S. P.

[10. In

Br. Aid, pl.  
130. cites  
S.C. because  
that is tra-  
versed,  
which is the  
cause of the  
aid, so  
where the  
command  
is traversed.  
the matter is in debate.

[10. In trespass for goods, if the defendant says that the goods were the goods of two of the king's enemies, and that he seized them as servant to J. S. and by his command, and to his use, and issue is taken upon the seizure in manner and form aforesaid, the defendant shall not have aid of his master, for the title of the master comes not in question, for peradventure another seized them for him. 7 E. 4. 13. b. per curiam præter Moile.]

Contra where the issue is upon the franktenement; for there the title of the master is in debate. — Fitzh. Aid, pl. 89. cites S. C.

Fitzh. Aid,  
pl. 89. cites  
S.C. —  
Br. Aid, pl.  
130. cites  
S.C.

[11. If a man justifies the taking of cattle in a close as servant to J. S. and by his command as damage feasant, &c. and the plaintiff says that he took them of his own wrong without such cause, the defendant shall have aid of J. S. for his title comes not in question. 7 E. 4. 13. b. per Jenny.]

Fitzh. Aid,  
pl. 89. cites  
S.C. —  
Br. Aid,  
pl. 130.  
cites S. C.

[12. But if he says that the place where, &c. is the freehold of J. D. and he as servant, &c. and the plaintiff says it is his freehold, and not the freehold of J. D. the defendant shall have aid of J. D. because his title comes in debate. 7 E. 4. 13. b. per Jenny.]

Fol. 172.

[13. In a replevin, if the defendant makes consuance as bailiff for a rent-charge granted to R. by W. and the plaintiff says that W. was obliged to him in a statute-merchant before the grant of the said rent, upon which issue is taken, the bailiff shall have aid of R. his master. 21 E. 3. Aid 183.]

14. Avowry upon consuance by bailiff of the seigniorie upon the plaintiff, tenant to the lord, for services of his master arrear. The plaintiff said that before the taking the lord leased to A. B. for 3 years, which is yet in being, judgment, &c. and the bailiff prayed aid of his lord, and the court ousted him of the aid. Br. Aide, pl. 92. cites 24 E. 3. 23.

[217]

15. The same law where the plaintiff pleads hors de son fee; the defendant shall not have aid of his master; but if deed was shewn forth, there he should have aid. Ibid.

16. Trespass by one against a miller who took toll, where he ought to grind toll-free. The defendant said that J. had the mill for term of life, to whom he is deputy, the reversion to W. in fee, and prayed aid of the tenant for life, and of him in reversion; and had it of the tenant for life, and not of him in reversion. Quod nota. And this for want of privity, as it seems. Br. Aid, pl. 30. cites 44 E. 3. 20.

(Q) Of whom it shall be granted. Not of him who is Party to the Action.

Br. Aid  
del Rby, pl.  
32. cites  
S. C. —  
Fitzh. Aid,  
pl. 116.  
cites S. C.

[1. ] If one defendant justifies as in the right of the other defendant, he shall not have aid of him; for this needs not, when he is party to the writ before. \* 45 E. 3. 1. b. Otherways in the case of the king. 7 H. 4. 2.]

[2. The

[2. The *same* law is in an *avowry*. 45 E. 3. 1. b.]

Br. Aid, pl. 32. cites

S. C. Contra if he was not named.—Fitzh. Aid, pl. 116. cites S. C. but S. P. does not appear.—Fitzh. Aid, pl. 117. cites S. C. and is of an avowry, but no mention of 2 defendants.

[3. So if one defendant justifies as servant to the other defendant, who makes default, he shall have aid of him. 8 H. 4. 16. adjudged; for he is not party before appearance; but there it is said by Hills, that aid ought not to have been granted.]

Br. Aid, pl. 45. cites S. C. accordingly; but per Hills if the one de-

fendant will make default, the other shall maintain the issue alone.

[4. So if one defendant justifies as in the freehold of another defendant and two other strangers, joint-tenants, yet he shall not have aid of him who is party to the action with others. 7 H. 6. 21. Curia.]

S. P. Br. Aid, pl. 71. cites 7 H. 6. 71.—Fitzh. Aid, pl. 60. cites

7 H. 6. 12. S. P. accordingly. [But it should be 7 H. 6. 21. a. pl. 137. and so Fitzh. and Br. seem to be misprinted both of them.]

[5. But in this case he shall have aid of the strangers. 7 H. 6. 21. Curia.]

S. P. Br. Aid, pl. 71. cites 7 H. 6.

71. But the plaintiff, to avoid delay, granted the aid of all.—Fitzh. Aid, pl. 60. cites 7 H. 6. 12. S. P. accordingly.—See the notes on pl. 4.

[6. In trespass against two, if one justifies as in the freehold of the other, as servant to him, and by his command, and the other says his freehold, the servant shall not have aid of the other, because he [his master] is party to the writ. \* 34 H. 6. 35. b. adjudged. 16 H. 7. Aid 173. per Fineux.]

\* Br. Aid, pl. 15. cites S. C.—Fitzh. Aid, pl. 185. cites S. C.

[7. But if the servant pleads this plea before the other appears, he shall have aid of him; for he is not party before appearance. 16 H. 7. Aid 173. 15 H. 7. 10.]

[8. If A. and B. recover in an assise against C. who brings an attain against them, and A. makes default, and B. says that this land and other land descended to her and A. and they made partition, and prays in aid of her, she shall not have aid, because she is party to the writ, though it may be that B. who prays in aid had all this land in allowance of other land, and so she shall lose her warranty pro rata. \* 30 Ass. 24. adjudged. † 50 Ass. 4. adjudged. 32 E. 3. Aid 37. adjudged; for the loss shall be equal without the aid.]

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\* Br. Aid, pl. 110. cites S. C. † Br. Aid, pl. 116. cites S. C.

[9. If the patron of a vicarage or parsonage brings an annuity against the vicar or parson, he shall have aid of the patron, though he be plaintiff in the action. \* 10 H. 6. 11. † 19 H. 6. 36. ‡ 18 E. 3. Aid 28. adjudged. ¶ 28 H. 6. 1. adjudged. 10 E. 4. 50. and he may join in aid. || 21 H. 6. 3. adjudged. 34 E. 3. Aid del Roy, 111. adjudged. 8 R. 2. Aid del Roy, 116. adjudged. Contra \*\* 23 E. 3. 21. b.]

See (Y) pl. 13. S. C. † S. P. Br. Aid, pl. 77. cites 19 H. 6. 36. and if at the summons the patron makes de-

fault, and the ordinary appears, the parson and the ordinary may plead without the patron, and if the patron appears and pleads a plea, which goes to charge the church, yet the parson may plead in discharge, and this plea shall be taken, and no regard to the plea of the patron, and the law of the plea of the ordinary, is, &c. wherefore he had the aid by award. ‡ Fitzh. Aid, pl. 28. cites 19 E. 3. and so Roll (18) seems misprinted.

\* Fitzh. Aid, pl. 78. cites S. C.—Note, that aid was granted of the plaintiff and others in an assise brought against a parson, though he cannot join in aid, &c. and this it seems, by reason of

of the others; for it was not granted of the plaintiff only. Br. Aid, pl. 12. cites 28 H. 6. 1.  
 Br. Aid, pl. 79. cites S. C. \*\* Fitzh. Annuity, pl. 36. cites S. C. that aid was granted of the patron.

So in annuity by abbat against parson, the parson prayed in aid of the ordinary and the abbot patron, and had it, though the plaintiff himself was patron, and had process against him. Br. Aid, pl. 107. cites 39 H. 6. 50.

Fitzh. Aid, [ 10. As in a cessavit by the patron against the parson, the parson shall have aid of the patron who is plaintiff, and of the ordinary. 22 E. 3. 3. adjudged.]  
 pl. 3. cites  
 S. C.—  
 See (X) pl.  
 27. S. C.

Br. Aid, [ 11. In a mortdancestor by three, scilicet, 2 aunts and a niece, if the tenant says that A. his wife was seised of the land in fee, and had issue by him B. one of the plaintiffs, and died, and that he is in as tenant by the curtesy, he shall have aid of B. in reversion, though she be one of the demandants, because it may be that she hath a release, or other thing which may bar the other demandants. 40 Ass. 37.]  
 pl. 22. cites  
 S. C. and  
 41 E. 3. 7.  
 —Fitzh.  
 Voucher,  
 pl. 207.  
 cites S. C.

Fol. 173. [ 12. In a formedon by two coparceners against a tenant for life, the tenant for life shall not have aid of the demandants which have the reversion, because they are demandants. 34 E. 3. Aid del Roy, 112. adjudged.]  
 In formedon  
 the tenant

said that J. was seised, and leased to the tenant for life, and after he granted the reversion to 7, and the tenant attorned, and then 4 released to 3, and after one of the three released to the two, and so he held for life, the reversion to the two, and prayed aid of them, and shewed all the deeds, and had aid; quod nota. Br. Aid, pl. 57. cites 14 H. 4. 32.

Br. Aid, pl. [ 13. If a man recovers land, and dies seised, and this descends to his daughter, who takes husband, and has issue, and dies, and after a writ of error to reverse this judgment is brought against the husband, tenant by the curtesy, and the heir, the husband upon the shewing of this matter shall have aid of the heir in reversion, though he be party to the writ. 47 Ass. 4. 9. adjudged.]  
 115. cites  
 47 Ass. 9.

[ 14. In a writ of cosinage by A. and B. two sisters, if A. be summoned and severed, the tenant being lessee for life, shall have aid of the demandants, which have the reversion, though he cannot have it of one of them alone without the other, for he needs no aid of A. who is severed, for he is discharged of him for the moiety, and for the other moiety he shall not have aid of the demandants, for he may plead any bar against him as against both. 34 E. 3. Aid del Roy, 110. adjudged.]

[ 15. In a writ of entry in nature of an assise against baron and feme, if the feme received upon the default of the husband says, that the land was given to her and her first husband, and to the heirs of the husband, she shall not have aid of the heir of her first husband, who has the remainder, if the heir be demandant. 12 R. 2. Aid 122. adjudged.]

Fitzh. Aid, [ 16. In an assise against several, one shall have aid of another who is party to the writ. 1 H. 7. 29. b. admitted.]  
 pl. 32. cites  
 1 H. 7. 28.  
 S. C. and says that aid does not lie in assise of one that is not named.—See (A) pl. 13.

[ 17. In a writ of entry against baron and feme and W. if W. makes default after default, and the baron and feme take upon them the



*the intire tenancy, and says they are but tenants for life, the reversion to W. they shall have aid of W. though he was party to the action, and has made default. 8 E. 2. Aid 168. adjudged.]*

[18. If a manor be demanded against three coparceners, and 2 make default after default, by which they lose their part, the third shall not have aid of them, because they were parties, as it seems, and no partition was between them. Dubitatur. 19 E. 2. Aid 172.]

[19. In a *scire facias* to execute a recognizance, if the sheriff returns the *conusor* dead, upon which a writ is awarded to warn the heir, and the sheriff returns the heir and B. as *ter-tenants* warned, the *ter-tenant*, being tenant in dower, shall not have aid of the heir in reversion, because he is party to the writ. 8 R. 2. Aid del Roy, 114. adjudged. But it does not appear whether the judgment was for this cause, or because the thing demanded would not bind him in reversion, though it should be now adjudged against tenant in dower, for both reasons were urged.]

See (B) pl. 10. S. C.

## (R) Against whom.

[1. If a villein brings an action of trespass, and the defendant justifies in the right of his lord, he shall have aid of the lord. 49 E. 3. 2.]

Br. Aid, pl. 35. cites S. C. but this point does not appear, but see pl. 2. infra.

[2. So if a stranger brings an action upon the statute of labourers for his servant, if the defendant justifies in the right of the lord, the servant being his villein, he shall have aid notwithstanding it is between strangers. 49 E. 3. 2.]

S. P. But per Belknap, if the plaintiff had said that de son tort de-

mesne without such cause, the defendant shall not have aid; quod non negatur. Note a diversity. Br. Aid, pl. 35. cites S. C.

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## (S) Of whom it shall be granted.

Fol. 174.

[1. If there be lessee for life, the remainder for life, the remainder in fee, the lessee shall have aid of both remainders at one time, because all began at one time, and depend upon the first estate. 11 H. 4. 63. b.]

Br. Aid, pl. 49. cites S. C. Owen 137. S. P.

[2. If there be lessee for life, the remainder in tail, the remainder in fee, the lessee shall not have aid of the remainder in tail only, but of both. 11 H. 4. 2. b. adjudged. 33 H. 6. 66. \* 43 Aff. 45. per Finchden. 11 R. 2. Aid, 120. nor of the remainder in fee only, but of both. † 7 H. 4. 18. b.]

The difference is where the remainder in fee was to the tenant for life, or to a

stranger, that in the first case he could not pray aid of himself, but in the last case he must pray aid of all those that are in remainder, and this by the opinion of all who argued. Fitzh. Aid, pl. 80. cites Hill. 33 H. 6. 6. And Roll (66) seems to be misprinted.

\* Br. Aid, pl. 114. cites S. C. for they are as one remainder, cites S. C.

† Br. Aid del Roy, pl. 27.

[ 3. If there be *lessee for life*, the *remainder in tail*, the *remainder to the right heirs of tenant in tail*, the lessee shall have aid of him in remainder. 25 E. 3. 39.]

• Br. Aid, pl. 49. cites S. C. that he and his companion together may have aid of the lessor.

[ 4. One *executor, lessee for years*, shall not have aid of his companion and lessor at one time, because he is not intirely tenant to the lessor, but [he shall have it] of *his companion*, and then both of *the lessor*. 11 H. 4. 63. b.]

• See (Y)

pl. 10. &c — Br. Aid, pl. 14. cites

S. C. accordingly. — Fitzh. Aid, pl. 80. cites S. C.

[ 5. If there be *lessee for life*, the *remainder in tail*, the *remainder in fee to the lessee*, the lessee shall have aid of him in remainder in tail only, and not of \* himself. 33 H. 6. 6. adjudged.]

Br. Aid, pl. 14. cites S. C. per Laycon.

[ 6. So if there be *lessee for life*, the *remainder in tail*, the *remainder to the lessee in tail*, the *remainder in fee to another*, the lessee shall have aid of him in remainder in tail, and of him in remainder in fee, but not of himself. 33 H. 6. 6. For a man shall not have aid of himself.]

S. P. For he is a stranger to the patent, and at no time def.

[ 7. If a man *justifies as servant to the grantee of the ward of the king*, he shall not have aid of the grantee and of the king presently; but he may have aid of the grantee, and when he comes in, he may have aid of the king. 4 H. 6. 12. b.]

Br. Aid del Roy, pl. 57. cites S. C. — Fitzh. Aid de Roy, pl. 11. cites S. C.

[ 8. If there be *lessee for life*, the *reversion in tail*, the *remainder in tail*, the *remainder in fee*, the lessee shall have aid of him in reversion, and of both remainders. 11 R. 2. Aid, 120. adjudged.]

[ 9. If a man *justifies as bailiff of a lessee for life*, he shall not have aid of him in reversion for want of *privity* between them. 11 H. 6. 39. b.]

[ 10. If there be *lessee for life*, the *reversion for life*, the *remainder for life*, the *remainder in fee*, the lessee shall not have aid of him in reversion for life only, but shall have aid of him and the others in remainder. 33 E. 3. Aid del Roy 108. adjudged.]

[ 221 ]

Br. Aid, pl. 30. cites 44 E. 3. 20. — Br. Trespass, pl. 47. cites S. C. and Brooke seems misprinted.

[ 11. In *trespass against a miller* for taking of toll, where he ought to be toll-free, if he be the miller of *A. who is lessee for life*, the *reversion to B.* he shall have aid of the lessee, but not of the reversion, for want of *privity*. 44 E. 3. 2. Brooke Aid 30.]

Fitzh. Age, pl. 106. cites S. C.

[ 12. If a man be *possessed of a ward in the right of his wife*, and a *replevin is brought by him*, and the *defendant avows for a rent-charge issuing out of the land*, the baron shall have aid of the heir, but not of the feme. 25 E. 3. 38. b. adjudged, 44.]

Fitzh. Aid de Roy, pl. 113. cites S. C.

[ 13. If a feme, *tenant in dower*, takes husband, and they lease the land to *B. for the life of the feme*, and after *B. is impleaded*, he shall not have aid of the baron and feme, as in the right of the feme; for though she hath a possibility to have it again, if she survives her husband, because she leased this in pais, yet she hath no  
§  
reversion

reversion or estate during the life of the husband. 19 R. 2. 113. adjudged.]

[14. But in this case B. the lessee shall have aid of the heir of the first husband, who hath the reversion only without the baron and feme, because he hath the immediate reversion. 19 R. 2. Aid del Roy 113. adjudged.]

Fol. 175.

[15. If *cestuy que use*, before the statute of 27 H. 8. had made a lease for years by the statute 1 R. 3. the lessee should have aid of the feoffees, though they were not privy to the making of the lease, because they had the reversion. \* 21 H. 7. 21. b. adjudged. † 8 H. 79. Curia. 11 H. 7. 6. b.]

\* Fitzh. Feoffment-  
al Uses, pl.  
17. cites  
S. C. but  
S. P. does  
not appear.

—Br. Aid, pl. 102. cites S. C. & S. P.

† Br. Aid, pl. 118. cites S. C. For there was privity in law, and all was well conveyed in law. — Ibid. pl. 148. cites 13 H. 7. 26. S. P. For the statute makes privity.

[16. In *replevin*, if the defendant avows upon B. as his very tenant, and the plaintiff says that B. leased to W. for 10 years, &c. which W. made him and one A. executors, and died, A. being living, he shall have aid of A. because he alone, without A. cannot have aid of B. 13 H. 4. Aid 186. adjudged.]

## (T) Abatement of Aid. By Death.

[1. ] If aid be granted of three, who have the reversion to them, and to the heirs of two of them, and at the summons ad Auxiliandum, the sheriff returns that one who had the fee is dead, this shall not abate the aid, because all survives to the rest. 4 H. 4. 3. b.]

Fitzh. Aid  
de Roy, pl.  
119. cites  
Mich. 4 H.  
4. 4. S. C.  
—Thel.  
Dig. 183.

lib. 12. cap. 5. s. 1. cites Mich. 4 H. 4. 1. S. P. The sheriff returned that the one was dead, and that the others were summoned, upon which the tenant was put to answer, without praying in aid de novo.

[2. But if the reversion had been to two persons, [\* parceners] it had been otherways for the several right. (It seems intended in common, of which there should be no survivor.) 4 H. 4. 3. b.]

\* Fitzh.  
Aid de Roy,  
pl. 119.  
cites 4 H.  
4. 4. S. C. and S. P. by Hornby.

3. In *replevin* by the baron, the defendant avowed upon the baron and his feme, upon which the baron had aid of his feme, and afterwards they were at issue with the avowant, and the inquest ready to pass, and the baron said that his feme died after the last continuance, yet it was held by Newton that the inquest shall be taken. Thel. Dig. 183. lib. 12. cap. 5. s. 2. cites Hill. 21 H. 6. 24.

[ 222 ]

4. If prayee in aid dies, the original writ shall not abate; and if one coparcener prays aid of her coparcener to recover in value, and she dies, the writ shall abate; and if judgment be given that she recover pro rata, it is error. Hill. 20 H. 7. 10. a. b. pl. 19.

## (U) What Spiritual Person shall have Aid.

[ 1. **T**R. 1 E. 2. B. R. 57. *Error brought of a judgment in B. and error assigned, because it was there proceeded to take a jury against the parson, predecessor of the plaintiff of the glebe land without aid of the patron and bishop, and thereupon adjudged Quia ecclesia quæ semper est infra ætatem fungetur vice minoris nec est juri consonum quod infra ætatem existentes per negligentiam custodum suorum exhereditationem patiantur, &c. ideo reversed, &c.]*

\* S. P. per Bahbington and Cott. but contra per Paston, Strange, and Martin. And Brooke says, Quære of the aid, for after the plaintiff granted the aid gratis, because he would not be delayed. Br. Aid, pl. 76. cites S. C.——Ibid. pl. 141. cites S. C. that he shall have aid.——Br. Dean and Chapter, pl. 8. cites S. C.——Fitzh. Aid, pl. 63. cites S. C. that a parson shall have aid.——D. 239. b. pl. 41. S. P. by Walth, Weston, and Dyer. † Fitzh. Aid, pl. 69. cites S. C.

[ 2. A parson shall have aid because he hath not the meer right. \* 8 H. 6. 24. b. † 11 H. 6. 9. 20 H. 6. 46. 33 E. 3. Aid del Roy 103.]

\* Br. Aid, pl. 141. cites S. C. [ 3. So a prebendary for the same reason shall have aid. \* 11 H. 6. 9. adjudged. 33 E. 3. Aid del Roy 103.] accordingly; for it was agreed that parson nor prebend cannot have writ of right, but only juris utrum.——Fitzh. Aid, pl. 69. cites S. C.——D. 239. b. pl. 41. S. P. by three judges.

S. P. Br. Aid del Roy, pl. 15. [ 4. A master of an hospital, who hath no college nor common seal, shall have aid. 44 E. 3. 11. b.] cites S. C. but contra if he has a college and common seal, per Thorpe.——Fitzh. Aid de Roy, pl. 54. cites S. C. and S. P. accordingly.

\* Br. Aid del Roy, pl. 15. cites S. C. [ 5. But an abbot shall not have aid. \* 44 E. 3. 11. b. † 11 H. 4. 68. b. because he hath the right in him, and may have a writ of right. 8 H. 6. 24. b. 11 H. 6. 9. † 20 H. 6. 46. 14 E. 3. † Br. Aid, Aid 22. Contra 8 H. 6. 24. b.] pl. 50. cites S. C. accordingly.——Fitzh. Scire Facias, pl. 71. cites S. C. † Fitzh. Faux Recovery, pl. 7. cites Trin. 20 H. 6. 45. S. C.

\* Br. Aid del Roy, pl. 15. cites S. C. [ 6. Nor a dean. 44 E. 3. 11. b.]——Fitzh. Aid de Roy, pl. 54. cites S. C. and S. P. admitted. A dean may have aid of the patron and ordinary where he is in by presentation. Br. Aid, pl. 95. cites 9 E. 4. 16.

\* Fitzh. Counterple del Aide, pl. 13. cites S. C. and S. P. accordingly, per Thirne. [ 7. If an abbot be sued as parson, he shall have aid of the patron and ordinary. \* 6 H. 4. 5. b. 11 H. 4. 6. b. † 68. b. 8 R. 2. Annuity 53. adjudged.] † Fitzh. Scire Facias, pl. 71. cites S. C.——Br. Aid, pl. 50. cites 11 H. 4. 68. per Thirne.

[ 223 ] [ 8. If an abbot hath used to present a monk to the patron of the priory who ought to present him to the bishop, who ought to institute him prior, if this prior hath a convent and common seal, although the prior be presentable, yet he shall not have aid, because he hath the right

Br. Aid, pl. 50. cites S. C. ac.

right in him, and may maintain a writ of right. 11 H. 4. 68. b. cordingly. —Fitzh. Scire facias, pl. 71. cites S. C.  
adjudged.]

[9. If a man founds a new chantry, and orders that they shall have a common seal, and that the chaplains shall be presented, they shall not have aid. 11 H. 4. 6. 8. b.] Fol. 176.

[10. If a prebendary hath a covent and a common seal, he shall not have aid, because he may have a writ of right, 11 H. 6. 9.]

[11. A master of an hospital shall have aid. 2 E. 3. 47. b. 48. adjudged.]

[12. A master of an hospital who is by election, shall not have aid, for he is in equal estate with an abbot, and shall not have a juris utrum. 14 E. 3. Aid 22. adjudged.]

[13. So he shall not have aid though the master be to be presented by the patron of the place to the ordinary, for divers priors and abbots are presentable. 14 E. 3. Aid 22. adjudged.]

[14. A master of an hospital presentable who hath a college and covent seal shall not have aid. 33 Edw. 3. Aid del Roy 103. said to have been adjudged and agreed.]

[15. A parson appropriate shall have aid of the patron and ordinary in annuity. \* 6 H. 4. 5. b. adjudged. ¶ 11 H. 4. 68. b. 8 R. 2. Annuity 53. adjudged.] \* Fitzh. Counterple del Aide, pl. 13. cites S. C.

S. C. ¶ Br. Aid, pl. 50. cites S. C. —Fitzh. Scire Facias, pl. 71. cites S. C.

[16. A prior, though he himself be patron, shall not have aid, for he being by election has the right in him. 14 E. 3. Aid 22.]

[17. So he, or an abbot shall not have aid, though they are presentable. 14 E. 3. Aid 22.]

[18. A bishop shall have aid of the prior and chapter, though he be the sovereign of the priory and chapter. 18 E. 3. 7. b. adjudged.] Fitzh. Aid, pl. 138. cites S. C. — See (X) pl. 28. 40. 41. S. C.

[19. A bishop shall have aid of the dean and chapter. 5 E. 2. Aid 167. adjudged.]

[20. A bishop shall not have aid of the king who is patron, because he is elective. 38 E. 3. 19. Contra 33 E. 3. Aid del Roy 103. per Thorpe.]

[21. A dean of a free chaple of the king, who has no college or covent seal, shall have aid of the king if his deanry be in demand. 33 E. 3. Aid del Roy, 103. agreed.]

[22. A dean who is of the collation of the king shall have aid of the king, though he and the chapter have a common seal, and may charge it, because he is not elective, but comes in by collation. 38 E. 3. 19. adjudged.] Co. Litt. 341. b. that such dean shall not have aid.

[23. A dean and chapter shall not have aid of the bishop. Contra 32 E. 3. Aid 40. adjudged.]

[24. A bishop who comes in as voucher upon his own warranty, shall have aid of the dean and chapter. 5 E. 2. Aid 167. adjudged.] See (N) pl. 1. S. C.

[ 25. If a *dean of a free chapple of the king, who has not a covent seal nor college, has a church appropriated to him* which is demanded by a writ of right of advowson, he shall have aid of the king. 33 E. 3. Aid del Roy 103. by all the justices, præter Thorpe.]

[ 224 ] [ 26. If the *king be seised of the possessions of a prior alien in the time of war, and after leases them to the same prior during the war, rendering rent, the prior in an annuity shall have aid of the king, though he be a prior perpetual, not removeable, and though the charter of the lease be that he shall discharge all charges.* 20 E. 3. Aid 2. adjudged.]

Fol. 177.

(X) In what *Actions* it shall be granted.

\* Fitzh. Aid, pl. 73. cites S. C. — Br. Aid, pl. 78. at the end cites 19 H. 6. 44. that it was agreed that successor should have aid in scire facias. Br. Aid, pl. 76. cites S. C. [ 1. ] IN a *scire facias* to execute an annuity against a parson upon a judgment against the predecessor, in which no aid was granted, the defendant shall have aid, because there may be a release after to the patron, but it does not appear whether the first judgment was by *Nient dedire*. \* 19 H. 6. 44. adjudged. † 8 H. 6. 23. adjudged, 24.] † Fitzh. Aid, pl. 63. 64. cites S. C. —

\* Br. Aid, pl. 24. cites S. C. accordingly, but cites 29 E. 3. Fitzh. Scire Facias, 152. contra. — Fitzh. Aid, pl. 112. cites S. C. that the aid was granted by advice of the court. [ 2. [So] in a scire facias to execute a judgment in a writ of annuity, in which the predecessor of the defendant *had aid of the father of the patron which now is*, the defendant shall have aid, the judgment being by *nient dedire*, because perhaps the plaintiff had after released to the patron. \* 41 E. 3. 20.]

\* Br. Aid, pl. 29. cites S. C. accordingly, because his predecessor had had the aid before. Quod nota. — Fitzh. Aid de Roy, pl. 57. cites S. C. [ 3. Contra \* 44 E. 3. 18. adjudged, but it does *not appear whether the judgment was by \* nient dedire*, and so 46 E. 3. 6. b. adjudged.]

† A man brought annuity against a parson, who prayed aid of the patron and ordinary, and they were returned summoned, and would not appear, wherefore he confessed the *relion*, and died, and afterwards the recoveror sued scire facias on the recovery against the successor, who prayed aid of them again; and held that he should have aid, and yet they were the same persons that made default, and would not appear before. — Fitzh. Aid, pl. 61. cites Trin. 7 H. 6. 38. — Br. Aid, pl. 72. cites S. C. & S. P. but says that the same person shall not have aid afterwards in scire facias on the same judgment.

Fitzh. Aid de Roy, pl. 57. cites S. C. but I do not observe S. P. [ 4. But if in such case the *defendant alleges a release between the judgment and scire facias*, aid shall be granted. 46 E. 3. 6. b.]

\* Pr. Aid, pl. 99. cites S. C. — † Fitzh. Aid, pl. 61. cites S. C. — S. P. But it was agreed there, that if the same parson or tenant for life who has aid, and the patron and ordinary, or he in reversion, makes default, and the demandant recovers, then the same parson or tenant [ 5. [So] In a scire facias against a parson to execute an annuity upon a judgment against a predecessor, in which aid was granted, and the *patron and ordinary fecerunt defaultam*, and the defendant acknowledged the action, this successor shall have aid, because it may be released after. \* 14 H. 6. 8. † 7 H. 6. 38. b.]

tenant



tenant for life shall not have aid in scire facias upon the same judgment, & concordat Prisot. 34 H. 6. 2. But it was not adjudged. Br. Aid, pl. 72. cites 7 H. 6. 38.

[6. *But* in a scire facias to execute an annuity against a parson, upon a judgment against the predecessor, he shall have aid. \* 12 H. 4. 4. b. † 19 H. 6. 2. b. because there may be a release after.] \* Br. Aid, pl. 54. cites S. C. and 8 H. 6. 23. according-

ly. † Br. Aid del Roy, pl. 44. cites S. C.—Fitzh. Aid de Roy, pl. 20. cites S. C. but S. P. does not appear either in Br. or Fitzh. as to the release.

[7. [*But*] In a scire facias to execute a judgment had against the defendant himself in annuity, the defendant shall not have aid. 12 H. 4. 18.] [ 225 ] Br. Aid, pl. 55. cites S. C.—

Fitzh. Counterplea del Aid, pl. 17. cites S. C. that annuity was brought against a parson, and alleged seisin by the hands of the defendant, who prayed aid. It was answered by Norton, that the plaintiff had alleged seisin by defendant's hands, as in scire facias on recovery against the defendant himself. But per Thirn. this action is to try the right of the annuity, which shall not be done without making the ordinary and patron party, &c.

In scire facias upon recovery in writ of annuity, the defendant shall have aid of the patron and ordinary, and yet essoign does not lie for the patron and ordinary at the day of the summons ad auxilium, by reason of the statute of W. 2. cap. 45. which ousts delays in scire facias. Br. Aid, pl. 107. cites 39 H. 6. 50.

[8. *So* if he had aid of the patron and ordinary. 7 H. 6. 39. 17 E. 3. 56. b. admitted.]

[9. [*But*] In a scire facias to execute an annuity against a parson, upon a judgment against his predecessor, in which aid was granted of the patron and ordinary, the defendant shall have aid. But it does not appear whether the first judgment was by *nil dicit*, or how, because there may be a release after to the patron, to which the parson is a stranger. \* 8 H. 6. 23 b. 38 E. 3. 25. adjudged.] \* Br. Dean and Chapter, &c. pl. 8. cites S. C. & S. P.—Fitzh. Aid, pl. 64. cites S. C.—D. 26. pl. 169. Hill.

28 H. 8. S. P. admitted generally, without mentioning the reason.

[10. [*So*] In a scire facias against a parson to execute a judgment had in a cessavit against a predecessor, the defendant shall have aid, because there may be a release after the judgment. 10 H. 6. 5. b. adjudged contra. 8 H. 6. 24. 33. b. Dubitatur.] \* Per Babington & Cott. He shall have aid as well here as

upon a recovery in writ of annuity. But contra per Paston, Strange, and Martin; for annuity cannot be granted to bind the successor without the patron and ordinary, and there the successor may falsify the recovery. Contra upon a recovery in præcipe quod reddat, as here; for præcipe quod reddat is well brought against tenant for life, and he shall not have aid in scire facias, but is put to his writ of error or attain; and a parson has a better estate than for term of life: for he may join the wife, and by his alienation the patron cannot enter, &c. Quære of the aid. Br. Aid, pl. 76. cites 8 H. 6. 24.—Br. Dean and Chapter, &c. pl. 8. cites S. C. & S. P. as to the præcipe quod reddat, by the best opinion.—Fitzh. Aide, pl. 63. cites S. C. as to the cessavit.

[11. In a writ of annuity aid shall be granted of the patron and ordinary. \* 46 E. 3. 6. b. † 6 H. 4. 5. because the church is to be charged by the recovery. 2 H. 6. 8. b. 7 H. 6. † 19. b. \*\* 38 b. 39. 11 H. 6. ¶ 9. ¶ 10. b. 20 H. 6. 46. 6 E. †† 43. 9 H. 5. 14. 8 R. 2. Aid del Roy 116. adjudged. 20 E. 3. Annuity 32. 16 E. 3. Annuity 23. adjudged.] \* Fitzh. Aid del Roy 11. 57. cites S. C. & S. P. admitted. † Fitzh. Counterplea del Aid, pl. 13. cites

S. C. † Fitzh. Aid, pl. 59. cites S. C. in debt for annuity.—Br. Aid, pl. 70. cites S. C. \*\* Fitzh. Aid, pl. 61. cites S. C.—Br. Aid, pl. 72. cites S. C. but see pl. 3. supra in the note, ¶ Fitzh. Aid, pl. 69. cites S. C.—Br. Aid, pl. 141. cites S. C.—See (U) pl. 2. 3. (Y) R 4 pl. 5.

pl. 5.      ¶ Br. Aid, pl. 142. cites S. C.—Br. Aid de Roy, pl. 105. cites S. C.—See (Y)  
 pl. 7. S. C.    †† Fitzh. Aid, pl. 87. cites Mich. 6 E. 4. 3. S. P. and seems to be S. C. intended by  
 Roll, but misprinted.

\* Br. Aid, [ 12. So aid shall be granted, *although seisin be alleged by the*  
 pl. 55. cites *hands of the defendant himself, [and] though the action be brought of*  
 S. C.— *his own subtraction.* \* 12 H. 4. 18. 13 R. 2. Aid 125. ad-  
 Fitzh. *judged.* 16 E. 3. Aid 132. adjudged.]  
 Counterple *del Aid, pl.*  
 17. cites S. C.—See pl. 7. *supra* in the notes.

[ 226 ] [ 13. In debt for the arrearages of an annuity, by an executor  
 \* Fitzh. *against a parson, he shall have aid.* \* 1 H. 6. 6. † 2 H. 6. 8.  
 Aid, pl. 48. *adjudged.* † 7 H. 6. 19. b.]  
 cites S. C.—

Br. Aid, pl. 105. cites S. C. that he was executor of a probendary, and had aid of the patron and ordinary.

† S. P. For though this action be but a personal action, yet because the plaintiff counted upon annuity by prescription, which title here may be tried, therefore it goes to the right. Br. Aid, pl. 4. cites S. C.    † Fitzh. Aid, pl. 59. cites S. C.—Br. Aid, pl. 70. cites S. C.

Fitzh. Aid, [ 14. But in debt for the arrearages of an annuity against a par-  
 pl. 48. cites *son, brought by an executor upon the grant of an annuity by the de-*  
 S. C. but *fendant for the life of the testator, he shall not have aid, because this*  
 the diver- *does not charge the church.* 2 H. 6. 8. b.]  
 sity be-  
 tween this  
 and the former plea, does not appear there.

See *supra*, [ 15. In a scire facias to execute a fine of the manor of E. against  
 pl. 1. &c. J. S. who is master of the hospital of the said E. so that this is to  
*defeat his name, he shall have aid of the patron and ordinary.* 2  
 E. 3. 48. adjudged.]

† And the [ 16. In debt against a parson for a pain, for non-payment of an  
 executor *annuity, he shall have aid of the patron and ordinary; for the*  
 church shall be \* charged by this. † 7 H. 6. 19. b. adjudged. 40  
 E. 3. 4. 8 H. 6. 6. 9 H. 6. 56.]

of the pre-  
 decessor shall not be thereof charged. Br. Aid, pl. 70. cites S. C.—Fitzh. Aid, pl. 59. cites  
 S. C. and the church shall be charged with the nomine pæne as well as with the annuity.

Br. Aid, pl. [ 17. In a scire facias to execute a judgment in an annuity, if in  
 99. cites *the first action the parson had aid granted of the patron and ordinary,*  
 S. C.— *and they would not join, and then the parson \* acknowledged the*  
 See *supra* *action, this successor shall have aid.* 14 H. 6. 8.]  
 pl. 1.  
 &c.

\* See pl. 3. in the notes.

Br. Aid, pl. [ 18. The same law in such case, if the judgment had been given  
 99. cites *upon the default of the parson.* 14 H. 6. 8.]  
 S. C.

Br. Aid, pl. [ 19. So if the parson in such case had traversed the title of the  
 99. cites *action, and this had been found against him, the successor should*  
 S. C. ac- *have aid in this scire facias, because there may be a release after.*  
 cordingly. 38 E. 3. 18. b. adjudged. Contra \* 14 H. 6. 8. Curia.]

\* Br. Aid, [ 20. If in a writ of an annuity the parson hath not any aid of the  
 pl. 99. cites *patron and ordinary, but he traverses the title of the plaintiff, and*  
 S. C. ac- *this is found against him, [yet] in a scire facias against the succes-*  
 cordingly. *for,*

for, he shall have aid, because there may be a release after. Contra, Otherwise it is where he renders in court, or makes default.  
\* 14 H. 6. 8. Curia.]

[21. The same law though the patron and ordinary join in aid, in the writ of annuity, because there may be a release after. Contra 14 H. 6. 8. Curia.]

[22. So if in an annuity aid be granted of the king, and after several procedendo's granted the plaintiff recovers, yet in a scire facias against the successor, he shall have aid again of the king, because there may be a release after. 17 E. 3. 56. b. adjudged.]

[23. In a mortdancestor against a parson, he shall have aid of the patron and ordinary. 8 Aff. 36.] \* Br. Aid, pl. 108. cites S. C.—

Fitzh. Aid, pl. 157. cites S. C.

[24. In a præcipe quod reddat against a parson for the glebe land, he shall have aid of the patron and ordinary, because he hath not the meer right, and the patron and ordinary will receive prejudice thereby. 3 E. 2. Aid 164. adjudged. Contra \* 8 H. 6. 24. b.] [227] Fitzh. Aid, pl. 63. cites S. C. but not S. P.—

pl. 76. cites S. C.—Br. Dean and Chapter, pl. 8. cites S. C. but not exactly S. P.—  
See pl. 27. in the notes.

[25. So he shall have aid in a formedon against him for the land which he hath as parson. \* 17 E. 3. 58. b. adjudged. 18 E. 3. 54. b.] \* Fitzh. Aid, pl. 137. cites S. C.

[26. So he shall have aid in a writ of entry for rent. 21 E. 3. 55. b. adjudged.] Fitzh. Aid, pl. 55. cites S. C. and

Ibid. pl. 182. cites S. C.—Writ of entry in nature of assise against the parson of N. who said that the land is parcel of his glebe, and prayed aid of the patron and ordinary, and was ousted by award; for he shall not have aid in this action, because he is supposed in of his own wrong, and therefore shall have aid of none unless he be named in the writ. Br. Aid, pl. 59. cites 9 H. 5. 17.

Entry in the post against the parson of D. who prayed aid of the patron and ordinary, and said that this is parcel of his glebe; quære; for there was no more said of it. Br. Aid, pl. 93. cites 4 H. 6. 1.

[27. So he shall have aid in a cessavit. \* 21 E. 3. 55. b. † 22 E. 3. 3.] \* Fitzh. Aid, pl. 55. cites S. C.

and Ibid. pl. 182. cites S. C.—See (A) pl. 8. S. C. Infra, pl. 37. S. C. † Fitzh. Aid, pl. 3. cites S. C.

In scire facias brought by one as heir upon a recovery in cessavit against a parson, the defendant who was the successor, pleaded that he found the church seised of this land, and that it was parcel of the glebe, and so had been time out of mind, and prayed aid of the patron and ordinary, and it was granted. Fitz. Aid, pl. 63. cites Hill. 8 H. 6. 24.—Br. Aid, pl. 76. cites S. C. accordingly.—Br. Dean and Chapter, pl. 8. cites S. C.—See (Q.) pl. 10. S. C.

[28. In an action against a bishop for land, or other freehold, he shall not have aid of the prior and chapter. 18 E. 3. 7. b.] Fitzh. Aid, pl. 138. cites S. C.—

See infra, pl. 40. 42. S. C.—(U) pl. 18. S. C.

[29. [But] Vide 5 E. 2. Aid 167. The bishop had aid of the dean and chapter in a præcipe quod reddat.]

[30. In a scire facias to have execution of a fine against a prebendary of certain land, the prebendary shall have aid of the patron and ordinary. 20 E. 3. Aid 30.]

[31. So

[ 31. So aid lies though his name of prebendary is to be defeated by this writ. 20 E. 3. Aid 30.]

[ 32. In a *juris utrum* the parson shall have aid of the patron and ordinary, because he may lose the land for ever in this writ. Contra 9 H. 5. 14. per June.]

But it was held that he who may maintain writ of right of

[ 33. In a writ of right brought against a parson, he shall have aid of the patron and ordinary, though he found not the church seised, if he claims it in the right of the church, and had recovered it before in a *juris utrum*. 3 E. 2. Aid 164. adjudged.]

advowson shall not have aid of the patron and ordinary if he be impleaded. Thel. Dig. 19. lib. 1. cap. 22. f. 9. cites Pasch. 5 E. 3. fol. 189.

[ 34. In an action of trespass for cutting his trees, if the defendant says that he is parson, and that the place where, &c. is parcel of the glebe of his rectory, upon which they are at issue, the defendant shall have aid of the patron and ordinary, because he himself is tenant of the freehold. 12 R. 2. Aid 121.]

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[ 35. In a cessavit against a parson of his own cesser, if the tenant says, that he holds the land as the demandant has acknowledged, he shall not have aid of the patron and ordinary. 17 E. 2. Aid 170. adjudged.]

[ 36. In a replevin by a parson, if the defendant avows upon the plaintiff for service arrear, he shall have aid of the patron and ordinary. Contra 17 E. 2. Aid 170. per Devon.]

Fitzh. Aid, pl. 55. cites S. C. and ibid. pl. 182. cites S. C.

[ 37. In a cessavit against a vicar, if he found his church seised, he shall have aid of the patron and ordinary. 21 E. 3. 55. b. per Hill said to have been adjudged.]

—See (A) pl. 8. S. C. supra pl. 27. S. C.

Br. Aid, pl. 5. cites S. C. per cur.— Fitzh. Aid, pl. 52. cites S. C.

[ 38. If a writ of annuity be brought against a parson upon a grant by the parson himself without the confirmation of the patron and ordinary, he shall not have aid, because he himself is party to the grant, and this shall not charge the church. 2 H. 6. 12.]

Fitzh. Aid, pl. 52. cites S. C.—And upon the plaintiff's shewing the

[ 39. But he shall have aid, if the grant was confirmed by the patron and ordinary, because he himself is party to the grant, and well knows this is the cause of the charge, because this will charge the church. 2 H. 6. 12. adjudged.]

deed of the parson now defendant, and of the patron and ordinary to charge him, aid was granted him notwithstanding that himself was party. Br. Aid, pl. 5. cites S. C.

Fitzh. Aid, pl. 138. cites S. C.— See pl. 28. 44. S. C. and see (U) pl. 18.

[ 40. So a bishop shall have aid in annuity upon his own grant, which is confirmed by the prior and chapter, although he himself be sovereign of the priory and chapter, for this will charge the bishoprick. Contra 18 E. 3. 7. b.]

Br. Aid, pl. 18. cites S. C.— Fitzh. Aid, pl. 109. cites S. C.

[ 41. In annuity against a parson upon the grant of his predecessor, he shall have aid, although a deed of confirmation of the patron and ordinary be shewn, for the parson does not know whether it be their deed. 40 E. 3. 3. b. adjudged.]

[42. So in an annuity against a *bishop* upon a grant of the predecessor, with the confirmation of the prior and chapter, he shall have aid of the prior and chapter, though he himself be sovereign of the priory and chapter. 18 E. 3. 7. b. adjudged.]

Fitzh. Aid, pl. 138. cites S. C.—See (U) pl. 18. and supra pl. 28. 40. S. C.

43. Note for law in an *indicavit*, that if a *vicar* be impleaded of a thing touching his *vicarage*, he shall have aid of the parson; quod nota. Br. Aid, pl. 143. cites 31 H. 6. 7.

44. Aid lies in writ of *entry in nature of assise*, though it lies not in *assise*. Br. Aid, pl. 123. cites 4 E. 4. 14. admitted.

(Y) Spiritual Corporations. Of whom they shall [229] have Aid. Of the King. [Or others.]

[1. ] IN an *action* against an abbot of the foundation of the king, which will charge the abby, he shall have aid of the king. 6 H. 4. 5. b.]

Fitzh. Counterple del Aid, pl. 13. cites S. C.

[2. But in an annuity against an abbot as *parson appropriate* of a church, he shall not have aid of the king. 6 H. 4. 5. b. adjudged.]

Fitzh. Counterple del Aid, pl. 13. cites

S. C. accordingly; for by Huls, a man shall not have aid but of thing in demand, or of the thing out of which the thing is issuing, and the annuity is not issuing out of the abbey.—And Hankford said that there is a great diversity where he holds in *proprios usus*, and where not; for when he holds in *proprios usus*, it is parcel of the abbey, in which case if the abbey be recovered, &c. the patronage of the abbey is so far charged, but not so in the other case. And Thirn. bid them to take aid of the patron and ordinary without the king, &c. 11 H. 4. 6. a. pl. 27.

[3. In an annuity against a *parson*, if the *bishop* be patron and ordinary, and the *temporalities* seized by the king for cause, he shall have aid of the bishop and king. 40 E. 3. 3. b.]

Br. Aid, pl. 18. cites S. C.—Fitzh. Aid, pl. 109. cites

S. C.—*Scire facias* against master of an hospital, who said that the hospital is of the presentation of the bishop of S. who died, and the temporalities seized into the king's hands, the hospital voided, and the king gave it to the defendant for life by patent, which is here, and prayed aid of the king by reason of the temporalities yet in the king's hands. Br. Aid, pl. 28. cites 44 E. 3. 11.—Per Belk. he may implead, and be impleaded, and shall have writ of right of his possession. But per cur. he shall not have writ of right, but *juris utrum* as a parson; per Thorp, if he has college and common seal, he shall not have aid no more than an abbot or dean; quod nota. Br. Aid del Roy, pl. 15. cites S. C.

[4. So if the temporalities are in the king by vacancy of a *bishoprick*. 4 H. 6. 10. b.]

Br. Aid del Roy, pl. 54. cites 4 H. 6.

1. and seems to be the case intended.

[5. So if the temporalities are in the king by vacancy of a *bishoprick* which is patron to a *prebend* or parsonage, if the *prebendary* be sued during the vacancy, he shall have aid of the king. \* 11 H. 6. 9. 19 E. 3. Aid del Roy, 5. adjudged.]

\* Br. Aid, pl. 141. cites S. C.—Fitzh. Aid, pl. 69. cites S. C.

In trespass the defendant justified for common in a waste soil, and because it belonged to the bishop of N. and the temporalities are seized into the king's hand, pending the writ, therefore the defendant shall have aid of the king before issue joined, as he should have where the king is party; quod nota. Br. Aid del Roy, pl. 103. cites R. 3. 13.

[6. But

Br. Aid, [ 6. But if a *bishoprick* be full of a bishop at the time of suit, he  
pl. 141. shall not have aid of the king; for there the bishop with his chap-  
cites S. C.— ter may charge the church without the king. 11 H. 6. 9.]  
Fitzh. Aid, pl. 69. cites S. C.

Br. Aid, [ 7. So if the *patron* be in ward to the king, the parson shall have  
pl. 142. aid of the patron and king. 11 H. 6. 10. b.]  
cites S. C. and S. P. and that he shall have it of the ordinary also.——Br. Aid del Roy, pl. 105. cites  
S. C.

[ 230 ] [ 8. In an *assise* against the *presentes* of the king of parcel of his  
Br. Aid, glebe, the parson shall have aid of the king, though the king had  
de Roy, the presentation but *hac vice*, 43 Aff. 13. adjudged. Quære.]  
pl. 91. (90)  
cites S. C. and Brooke says that hence it seems that the parson of a church has not properly the  
fee simple as bishop, &c. have.——Br. Dean, &c. pl. 17. cites S. C.——Fitzh. Aid de Roy, pl. 95.  
cites S. C.

[ 9. The *dean* of a free chappel of the king of the collation of  
Fol, 180. the king, shall have aid of the king. 33 E. 3. Aid del Roy,  
103.]

Fitzh. Aid, [ 10. A *parson* appropriate shall have aid of himself and of the  
pl. 7. cites ordinary. 25 E. 3. 39. adjudged.]  
S. C.

Br. Coun- [ 11. A *parson* shall not have aid of himself being patron. ?  
terple H. 6. 41.]  
de Aid, pl. 10. cites S. C.

Br. Coun- [ 12. But he shall have aid of himself and another, being joint-  
terple patrons. 7 H. 6. 41.]  
de Aid, pl. 10. cites S. C.

\* Br. Aid, [ 13. He shall have aid of the patron, though he be plaintiff in  
pl. 138. the action. \* H. 6. 11. † 18 E. 3. 28. adjudged. ‡ 22 E. 3. 3.  
cites S. C. 34 E. 3. Aid del Roy, 111. adjudged. 8 R. 2. Aid del Roy, 116.  
according- adjudged. 26 E. 3. Annuity 32. adjudged.]  
ly.——Fitzh. Aid, pl. 68. cites S. C.——See (Q.) pl. 9. S. C. † Fitzh. Aid, pl. 141. cites 18 E. 3. 27. S. C.  
§ Fitzh. Aid, pl. 3. cites S. C.——See (X) pl. 27. S. C.——See (Q.) pl. 10. S. C.

Br. Aid, [ 14. Aid shall be granted of all those who have power to charge  
pl. 141. the church. 11 H. 6. 9.]  
cites S. C. & S. P. admitted.——Fitzh. Aid, pl. 69. cites S. C.

In annuity against a chantor of Exeter, parson of B. upon composition made between the pre-  
decessor of the plaintiff and the predecessor of the defendant, by which the defendant's predecessor  
granted the annuity to the plaintiff's predecessor, and his successor, for tithes which was con-  
firmed by the patron and ordinary; the defendant said that the Bishop of Exeter is patron of the  
benefice charged, and that his temporalities are seised into the king's hands, and prayed aid of the  
king, and of the bishop as patron and ordinary, and of the dean and chapter, because this per-  
sonage belongs to the chantor as one of the chapter, and had it de omnibus; quod nota. Br. Aid,  
pl. 18. cites 40 E. 3. 3.

\* S. P. for [ 15. As if a *prebend*, of which the bishop is patron and ordinary,  
the bishop, be to have aid, he shall have aid of the bishop, and the dean and  
patron, and chapter, because without all these the church cannot be charged.  
dean and \* 11 H. 6. 9. adjudged. † 25 E. 3. 54. adjudged, although this  
chapter are



*be of the several possessions of the bishop. In 33 E. 3. Aid del Roy one body. Br. Aid, pl. 103. it is said that he shall have aid of the dean and chapter, without mentioning the bishop, and this is said per Fish.]* 141. cites S. C.——

pl. 69. cites S. C.

† Fitzh. Aid, pl. 10. cites S. C.

[16. In an annuity against a parson, he shall have aid of both patrons, being coparceners.] D. 26. b. pl. 169. Hill. 28 H. 8.

S. P. admitted.——S. P. per cur. Obiter Noy 11. and cited D. 26.

[17. So if the king and common parson are coparceners of an advowson, though the king shall have all the presentations alone, yet the parson shall have aid of both. Trin. 3 Jac. B. R. in Harris's case, per Popham.] Noy 11. S. C. and S. P. agreed accordingly per cur.

[18. In an annuity against an incumbent, if he says that A. and B. were seised of the manor of D. to which this church was appendant, and an accord was made between them to present by turns, and A. presented him, yet he shall have aid of both patrons. 22 Hen. 6. 47.] [231] Br. Aid, pl. 88. cites S. C. and shall have aid of them, and of the ordinary, surmising that he found the church discharged; by the best opinion.——

Fitzh. Aid, pl. 76. cites S. C.

[19. So if one coparcener presents by turn, the incumbent shall have aid of all the coparceners. 22 H. 6. 47. Curia.] S. P. and not of him only who presented him. But Poole denied it, and after nothing of the matter was entered, therefore quare. Br. Aid, pl. 88. cites S. C.——Fitzh. Aid, pl. 76. cites S. C. & S. P. and says it was affirmed in a manner by all the justices.

[20. In an annuity against a parson appropriate, he shall have aid of himself as patron. 8 R. 2. Annuity 53. adjudged.]

## **(Z) Of the Ordinary. [And of the King or Patron together.]**

[1. **T**HE parson in an annuity shall have aid of the guardian of the spiritualties of the bishoprick, the see being vacant. 31 H. 6. 10. adjudged.] Br. Aid, pl. 146. cites S. C.——Fitzh. Aid, pl. 79. cites S. C.

[2. If the parson be to have aid of the king as patron, and of the ordinary, he shall not upon prayer have aid of the king only, without the ordinary, without praying in aid of both together; for otherways the plaintiff may be delayed again after, which is not reasonable. Tr. 3 Jac. B. R. Harris's case. Per curiam.] Noy 11. S. C. & S. P. accordingly agreed; for it had been no difference if a common person had been patron

Fol. 181.

(A. a) In what *Actions* they shall have Aid. Aid by Coparceners.

[1. ] **I**N a *scire facias* upon a *fine*, the tenant shall have aid of her coparcener, though this aid be in lieu of a voucher. 16 E. 3. Aid 130. adjudged. 33 E. 3. Aid del Roy 109. adjudged.]

[2. In a writ of *mesne* against a coparcener, to whom the services were allotted in *purparty*, in allowance of other land, she shall have aid of her coparcener. 3 E. 2. Aid 163. adjudged.]

[3. In a writ of *admeasurement of pasture* against a coparcener, (as is intended as it seems) she shall have aid of the other coparceners. 32 E. 2. Aid 178. adjudged.]

Fitzh. Aid,  
pl. 179. S.P.  
cites 30 E. 1.

[4. In a *cui in vita* one coparcener shall have aid of the other. 30 E. 1. Itinere Cornubiæ 179. adjudged.]

It. Cornub. and seems to be S. C. only that the word (aid) is omitted.

[232]

\* 9 Rep. 28.  
b. cites 2 E.  
3. 29. Ro-  
ger Morti-  
mer's case,

[5. In a *quo warranto* against one coparcener for holding co-  
nuance of pleas, she shall have aid of the other coparcener. 2 E.  
3. \* 55. b. adjudged. Co. 9. Ab. Str. Mar. 28. b. 2 E. 3.  
B. R. Rot. 128. adjudged in a writ of error.]

and there are not so many fol. as 55. of that year in the year-book.

[6. In a *formedon of a rent* against one coparcener, after *parti-  
tion*, she shall have aid of the other coparcener, though the rent be  
only in demand. 8 R. 2. Aid del Roy 116. adjudged.]

7. If two coparceners make *partition*, and afterwards in *præcipe  
quod reddat* against the one, she prays aid of the other, who is re-  
turned, warned, and makes default, yet the other who prays in aid  
shall deraign the first warranty as well as if her companion had  
come, and the other shall have pro rata against her, and she who  
made default shall not falsify the recovery. Br. Garrancies, pl. 55.  
cites 4 H. 7. 2. Per Keble.

## (B. a) What Coparceners [or Alienee of one] shall have Aid. In respect of the Estate.

Br. Coun-  
terplea de  
Aid, pl. 7.  
cites S. C.—  
Fitzh.  
Counterple  
del Aid,  
pl. 15. cites S. C.

[1. **W**HERE a *partition* is made without title of coparcenary,  
though by this they are coparceners by *estoppel between  
themselves*, yet they shall not have aid the one of the other; for  
they shall not delay the demandant, who is a stranger thereto by  
this. 11 H. 4. 60. b.]

Fitzh. Aid,  
pl. 136.  
cites Mich.  
13 E. 3. S. C.

[2. As if two intrude after the death of their father, who was  
but tenant for life, and make *partition*, they shall not have aid  
the one of the other, because they have no right. 17 E. 3.  
47.]

[3. So

[3. So if baron and feme are seised to them and the heirs of the feme, so that the baron hath but for life, the baron dies, and his daughters enter and make partition, and after the wife dies without laying claim to the estate, yet they shall not have aid the one of the other, because no right is to them descended. Contra 17 E. 3. 46. b. adjudged, for the not laying claim.]

Fitzh. Aid, pl. 136. cites S. C.

[4. If two disseisors make partition, and die, the heir of one shall not have aid of the heir of the other. 11 Hen. 4. 60. b.]

Br. Aid, pl. 48. cites S. C. but

S. P. does not clearly appear. ——— Fitzh. Counterple del Aide, pl. 15. cites S. C.

[5. So if two recover by action ancestrel, without title, the one shall not have aid of the other after partition, though between themselves they are coparceners by estoppel. 11 H. 4. 61.]

Fitzh. Counterple del Aid, pl. 15. cites S. C. ———

Br. Aid, pl. 48. cites S. C.

[6. But if two coparceners have a title ancestrel, and enter where their entry is not lawful, and make partition, yet they shall have aid one of the other. \* 11 H. 4. 60. b. † 17 Edw. 3. 46. b.]

\* Fitzh. Counterple del Aid, pl. 15. cites S. C. ———

† Fitzh. Aid, pl. 136. cites S. C.

[7. As if they enter upon a descent, and make partition, aid lies, having a right ancestrel by descent. 17 Edw. 3. 46. b. 39 Edw. 3. 4. b.]

[ 233 ]  
Fitzh. Aid, pl. 136. cites S. C.

[8. In an *ad terminum qui præterit*, if the writ supposes them tenants by their ancestor, though the ancestor had but for life, and his daughters entered and made partition, yet they shall have aid the one of the other. 17 Edw. 3. 47. b.]

[9. If tenant in tail leases for life, and after aliens the reversion to another by fine, and dies, and his daughters enter after the death of the lessee as coparceners, and make partition, in a *scire facias* to execute the fine (though this be to defeat the cause of their prayer, and their entry is not lawful, but because they have a right ancestrel,) they shall have aid the one of the other. Contra \* 21 Edw. 3. 15.]

Fol. 182.

\* Br. Aid, pl. 65. cites S. C. ———  
Fitzh. Aid, pl. 21. cites S. C.

[10. [So] if tenant in tail leases for life, and aliens the reversion by fine, and dies, and his daughters enter after the death of the lessee as coparceners, and the one takes husband, and has issue, and dies, and after the other dies, and a *scire facias* to execute the fine is brought against the tenant by the curtesy, and the other coparcener, the coparcener shall have aid of the heir, because they are in by descent, though the entry of their ancestor was not lawful. 21 Edw. 3. 15.]

Br. Aid, pl. 65. cites S. C. ———  
Fitzh. Aid, pl. 21. cites S. C.

[11. If two enter as coparceners, having no ancient right, and die seised, their heirs shall have aid one of the other, because they are in by descent. 21 Ed. 3. 15. will prove this.]

Br. Aid, pl. 65. cites S. C. ———  
Fitzh. Aid, pl. 21. cites S. C.

[12. If two coparceners make partition, and a seignior is allotted to one, and after the tenancy escheats to her, she shall have aid after of her sister, for this tenancy comes in lieu of the seignior. 16 E. 3. Age 46. per Thorpe.]

[13. It is no good counterplea of aid, that the ancestor by whom they

they claim *did not die seised*, for if he *had a right*, though he did not die seised, yet aid lies. Contra 29 E. 3. 6. b. but quære.]

See (E. a)  
pl. 8.

[ 14. In a *cui in vita*, if 4 sons, coparceners in gavelkind, are vouched upon the warranty of their ancestor, and 3 of them make default after default, by which seisin of the land is awarded for three parts, and the 4th enters into warranty, he shall not have aid of the other 3, because the land in demand never descended to them from their ancestor, and the charge is now equal, and the others have lost their part, and if he should have aid of them, he should recover also pro rata against them for his part, and so he should not lose so much as the rest. 19 Edw. 2. Aid 172. adjudged.]

Fitzh. Aid,  
pl. 136. cites  
S. C.—

[ 15. No coparcener shall have aid unless there has been a partition between them. 19 Hen. 6. 78. b. 17 E. 3. 47.]

See (E. a) pl. 2. S. C.

\* Br. Aid  
pl. 11. cites  
S. C.—

[ 16. But after partition one coparcener shall have aid of the other. \* 20 Hen. 6. 2. † 17 E. 3. 47.]

Fitzh. Voucher, pl. 35. cites S. C.

† Fitzh. Aid, pl. 136. cites Mich. 17 E. 3. S. C.

\* But they  
had not the  
aid in this  
case. Br. Aid, pl. 46. cites S. C.—

[ 17. Coparceners in gavelkind shall have aid one of the other. \* 11 Hen. 4. 22. b. † 17 Edw. 3. 12. b.]

Fitzh. Counterple del Aid, pl. 14.  
pl. 134. cites S. C.

† Fitzh. Aid,  
pl. 134. cites S. C.

[ 234 ]  
Br. Aid, pl.  
67. cites  
S. C. She  
vouched

[ 18. If there are two coparceners, and one releases to the other who is after impleaded, she shall vouch her sister who released; for this acceptance of the release does not destroy the privity of coparcenary. 21 E. 3. 27.]

her sister by this release of the one moiety, and prayed aid of her for the other moiety, because this countervails a partition in law, and so is the opinion of the court there.—See (C. a) pl. 2. S. C.—(E. a) pl. 6. S. C.

S. P. and  
also of this  
estate they  
two cannot  
join in  
voucher,  
for the one

[ 19. If there be tenant in tail, the reversion expectant to her and her sister in coparcenary, and she is impleaded, she shall not have aid of her coparcener, because she cannot recover pro rata, nor vouch over for this land, because she is not seised of the tail in coparcenary. 2 H. 6. 16. adjudged.]

is a stranger to the estate, and therefore per cur. he shall not have the aid; by which he vouched himself and the other as heirs of the donor, by reason of the reversion to them descended. Br. Aid, pl. 6. cites S. C.—Fitzh. Aid, pl. 5. cites S. C.—Co. Litt. 174. b. S. P. and cites S. C.—See (D. a) pl. 1. S. C.

\* Fitzh.  
Counterple  
del Aid, pl.  
14. cites  
11 H. 4. 22.  
S. C.—  
Br. Coun-  
terple de  
Aid, pl. 24. cites S. C.—

[ 20. If coparceners make partition, and one aliens, the alienor shall not have aid of the others. \* 11 Hen. 4. 23. It seems † 32 E. 1. 178. intended the heir of the coparcener who made the partition, though he pleads he has the estate of one of the coparceners.]

Br. Aid, pl. 46. cites S. C.  
cites Pasch. 32 E. 1. and seems to be the case intended by Roll.

† Fitzh. Aid, pl. 134.

\* Br. Aid,  
pl. 46. cites  
S. C. and

[ 21. So if after alienation she purchases, she herself shall not have aid of the other, because she comes in by the alienor, and not in privity

*privity of the coparcenary.* \* 11 Hen. 4. 22. b. adjudged. Contra they were  
18 E. 3. 65.] adjourned  
to another

term, at which day it was awarded that she should answer without the aid, because she is in of  
other estate, and cannot have the voucher or warranty paramount, because she is not in as heir, nor  
can she recover pro rata, because she is now purchaser, and so holds not in coparcenary.—Fitzh.  
Counterple del Aid, pl. 14. cites S. C.—Br. Counterple del Aid, pl. 24. cites S. C.—The  
coparcenary between them is determined; for now she is in of other estate. Br. Coparceners,  
pl. 5. cites S. C.—8. Rep. 75. b. cites S. C. accordingly.

[ 22. But after an alienation, if the coparcener comes to the land again in privity of the first estate, she shall have aid. 11 Hen. 4. 22. b.] **Fol. 183.**

Fitzh. Counterple del Aid, pl. 14. cites S. C.—Br. Aid, pl. 46. cites S. C.

[ 23. As if her alienee with warranty vouch her, and she enters into warranty, she shall have aid of the other, because now she comes in [in] privity of the first estate. \* 11 Hen. 4. 23. † 43 Edw. 3. 23. 18 Ed. 3. † 3. 31. admitted.] \* S. P. and yet in such case 11 H. 4. 22. one coparcener who made

a feoffment after purparty and retook estate in fee, was ousted of the aid; Quod nota.—Br. Aid, pl. 27. cites S. C.—Br. Counterple de Aid, pl. 5. cites S. C. but cites 11 H. 4. 22. Contra, therefore Brooke says, Quere if there be not a diversity between the feoffee himself, and the son of the feoffee. † Br. Aid, pl. 46. cites S. C. † This (3) seems too much.

If the feoffee of the coparcener be impleaded and vouches the feoffor, she may have aid of her coparcener to dereign the warranty paramount, but never to recover pro rata against her by force of the warranty in law upon the partition. Co. Litt. 174. a.—Hob. 21. Hobart C. J. said that she may dereign the warranty paramount, as if she were in possession, and cites 43 E. 3. 23.—And ibid. 26. Hobart Ch. J. said she may pray in aid of her fellow, and either have pro rata upon the loss, or vouch over with him upon the warranty paramount.

[ 24. So if one coparcener aliens with warranty, and takes back for life, and being impleaded prays in aid of the alienee, and he vouches her, and she enters into warranty, she shall have aid of the others. 11 Hen. 4. 23.] **[ 235 ]**  
Fitzh. Counterple del Aid, pl. 14. cites S. C.

[ 25. If partition be made between 3 coparceners in Chancery, and after one coparcener in a writ of error reverses the partition for inequality, and hath the manor of D. assigned to her for equality, and dies, and her heir aliens the said manor, and after another of the said coparceners brings a writ of error upon the last judgment against the heir and tertenant, the heir, though he hath nothing in the manor, shall have aid of the 3d coparcener, who is not named; for he is made privy by the writ. 42 Aff. 22. adjudged.] Br. Aid, pl. 113. cites S. C. and the coparcener was summoned, and came not, by which the heir was awarded

to answer alone.—Br. Error, pl. 131, cites S. C.—Fitzh. Affise, pl. 349. cites S. C.

[ 26. If there be two coparceners of land intailed, and they make partition, and after one leases her part for the life of the lessee with warranty, and the lessee being impleaded vouches her, and she enters into warranty, she shall have aid of her sister; for now she comes in in privity of the first estate. 14 Edw. 3. Aid 24. adjudged.]

[ 27. The same law if she had made a feoffment in fee with warranty, and the feoffee had vouched, &c. though the estate which she gave be higher than what she had. Contra 14 Edw. 3. Aid 24. Per Pole.]

[ 28. If after partition one coparcener leases her part for life, [to one]

one] who is impleaded, and he *vouches his lessor, who enters into the warranty, she shall have aid of the other coparcener.*]

[ 29. If a man leases land for life, and dies, by which the reversion in fee thereof, and other lands, descend to two coparceners, and they make partition, and the reversion is assigned to one, and for the better assurance of this partition, the other passes the reversion to her by fine, and after she who had the reversion is impleaded, she shall have aid of her coparcener, because the ancestor died seised thereof, and this descended to them, of which they had made partition, and the fine was only levied for the better assurance of the partition. 18 Edw. 2. Aid 171. adjudged.]

30. In assise it is said, that after the plaintiff is put to sue to the king for aid of the king granted to the tenant, or the like, there the procedendo ad captionem, assise, or ad iudicium, ought to accord with all pleas and originals, and of tenants, and of names. Br. Procedendo, pl. 7. cites 22 Ass. 28.

### (C. a) Of whom it shall be granted. [Coparceners.]

\* Br. Counterple de Aid, pl. 24. cites 11 H. 4. 22. S. C. — Fitzh. Counterple del Aid, pl. 14. cites 11 H. 4. 22. S. C. — See (B. a) pl. 20. 21. &c. S. C.      † Fitzh. Counterple del Aid, pl. 6. cites S. C.

[ 1. IF coparceners make partition, and one aliens her part, yet the other coparcener shall have aid of her, for her act shall not prejudice the other. \* 11 Hen. 4. 23. 29 Edw. 3. † 24 Edw. 3. 37. 8 Rich. 2. Aid del Roy 115. adjudged. The cause there is to dereign the warranty paramount, but it is there agreed she shall not have in value pro rata of her that hath aliened.]

[ 236 ]  
† Br. Aid, pl. 67. cites S. C. — See (E. a) pl. 6. S. C. — (B. a) pl. 18. S. C.

[ 2. If there be two coparceners, and the one hath released to the other in fee, and after she to whom the release was made is impleaded, she shall have aid of her sister for her own moiety, though she herself was party to the divesting the estate out of her sister, for she shall have aid for the voucher paramount. 21 Edw. 3. 27.]

• Fol. 184.

[ 3. If two coparceners make partition, and the one takes husband, and hath issue which dies, and after [she] dies without issue, by which the husband is tenant by curtesy, the reversion to the other coparcener, who is impleaded for her moiety, she shall not have aid of the tenant by the curtesy, because he is \* stranger to the blood, and holds not in coparcenary, and the reversion is in her who prays the aid. 16 Edw. 3. Aid 129. adjudged. 19 Edw. 3. Aid 144. Curia.]

[ 4. So in this case aid lies not of tenant in dower. 16 Edw. 3. Aid 129. Pet Gainford.]

\* Orig. is (en) and so misprinted.

[ 5. But in these cases, if the reversion had been in the heir of the other coparcener who died, or in a stranger, aid would have lain of tenant by the curtesy \* or dower, and he in reversion to have had in value. 19 Ed. 3. Aid 144. agreed.]

[ 6. If two coparceners make partition, and the one takes husband, both



*bath issue, and dies, by which the husband is tenant by the curtesy, the reversion to the issue, the other coparcener being impleaded shall have aid of the husband, tenant by the curtesy, and of the issue.*  
33 Edw. 3. Aid del Roy 109. adjudged.]

**(D. a) Aid of Coparceners. Causa efficiens.**

[1. **T**HE prayer in aid by one coparcener of the other, is for two causes, one to have in value *pro rata* against her coparcener, in case she loses, the other to have the warranty paramount in common in safeguard of their estates. 46 Edw. 3. 31. b. \* 11 Hen. 4. ¶ 22. b. † 2 Hen. 6. 16. 17 Edw. 3. 47. \*\* 21 Edw. 3. 14. b. † 2 Hen. 6. 7. b.]

\* Br. Aid. pl. 46. cites S. C.—  
Br. Coun-terplea of Aid, pl. 24. cites S. C.—  
† Br. Aid, pl. 6. cites  
‡ Br. Aid,

S. C.—See (B. a) pl. 19. S. C. ¶ Orig. is 226. but is misprinted, and should be 22. b. pl. 45. \*\* Br. Aid, pl. 65. cites S. C.

[2. One shall have aid of the other, *though there can be no recovery in value, if the warranty paramount may be deraigned thereby.* 21 Edw. 3. 27. admitted. 8 Rich. 2. Aid del Roy 115.]

S. P. Co. Litt. 174. 21

**(E. a) In what Cases. Aid by Coparceners.**

[1. **I**F coparceners make partition, and after one is impleaded, he shall have aid of the rest. \* 2 Hen. 6. 7. b. \*\* 17 Edw. 3. 47.]

\* Br. Aid, pl. 7. cites S. C.—  
\*\* Fitzh.

Aid, pl. 136. cites Mich. 17 E. 3. S. C.—Br. Aid, pl. 112. cites 40 Aff. 24. S. P.

[2. But one coparcener shall not have aid of the other before partition. 17 Edw. 3. 47.]

pl. 136. cites Mich. 17. E. 3. S. C. Fitzh. Aid,

[3. One coparcener shall not have aid of the other before partition in deed or in law. 29 Edw. 1. b. 2.]

[4. But if one coparcener takes husband, bath issue, and dies, in a *præcipe* against the tenant by the curtesy and the other coparcener, the coparcener shall have aid of the heir who is coparcener of the reversion with her, though there be no partition between them; for the tenancy by the curtesy bath in a manner made a partition. 21 Edw. 3. 14. b. 15. adjudged.]

Br. Aid, pl. 65. cites S. C.—  
Fitzh. Aid, pl. 21. cites S. C.  
See (I) pl. 19. S. C.

[5. And in this case, for the same reason, the tenant by the curtesy shall have aid of the heir in reversion, for the weakness of his estate. 21 Edw. 3. 14. b. adjudged.]

Br. Aid, pl. 65. cites S. C.—  
Fitzh. Aid, pl. 21. cites S. C.

[6. If two coparceners are seised, and the one releases to the other, and after an action is brought against her to whom the release was made, she shall have aid of her sister for her moiety, though

Br. Aid, pl. 67. cites S. C.—  
Br. Coun-

terple de Voucher, pl. 29. cites S. C. ———— *though no partition was made between them, because this release hath in a manner made a partition of their moieties.* 21 Edw. 3. 27.]  
 See (C. a) pl. 2. S. C. ———— (B. a) pl. 18. S. C.

Br. Aid, pl. 67. cites S. C. but it  
 [ 7. If land descends to two coparceners, and one enters claiming the whole to her own use, and after the other releases to her in fee, if she be after impleaded, she shall not have aid of her sister for her own moiety, because the release enures by way of extinguishment, and so this does not amount to a partition. 21 Edw. 3. 27.]

seems to be contra where one enters in the name of both; for this is a partition in law, and countervails entry and feoffment for a moiety; and so is the opinion of the court there, by which they took issue upon the entry. ———— Br. Counterple de Voucher, pl. 29. cites S. C. accordingly.

See (B. a) pl. 14. S. C. cites 19 E. 2. Aid 172. adjudged.  
 [ 8. In a *cui in vita*, if four coparceners in gavelkind are vouched upon the warranty of the ancestor, and three make default after default, upon which seisin of three parts of the land is awarded, and the fourth enters into warranty, he shall not have aid of the other coparceners, because they were not parceners of the land demanded.]

\* In former don the tenant alleged a descent in tail, and shewed how, (viz.) to him and to one K. which K. of her purparty enfeoffed W. and so held she with K. in purparty, and prayed aid of K. Per Finch. by the alienation of K. she has nothing of which you may recover *pro rata*, and in such case you shall have the voucher paramount alone, and shall have the warranty alone; and Knivet agreed by which the tenant passed over. Br. Aid, pl. 61. cites 38 E. 3. 20. ———— Fitzh. Aid, pl. 107. cites S. C. by Belk. + Fitzh. Aid, pl. 107. cites S. C. Knivet said, he knew not how they could have aid, by reason, &c. and thereupon issue was taken upon *Ne dona pas*, &c.

[ 9. If one coparcener aliens her part, and after the other is impleaded, she shall have aid, because this alienation is a partition in law. 29 Edw. 3. 2. \* 38 Edw. 3. 20. b. said that it had been adjudged 8 Rich. 2. Aid del Roy 115. adjudged. Contra + 38 Edw. 3. 20. b.]

\* See Co. Litt. 167. b. The different opinions of Bracton and  
 [ 10. So if one coparcener recovers her moiety in any assise against the other, she shall have aid; (for this is a recovery with a partition, as is intended;) for this is a \* partition in law. 29 Edw. 3. 2.]

Britton, as to such recovery, being a partition in law; and Coke says it seems reasonable that it is not a partition; for he must have his judgment according to his plaint, and that was of a moiety, and not of any thing in severalty; and the sheriff cannot have any warrant to make any partition in severalty, or by metes and bounds. ————  
 [ 238 ] 6 Rep. 13. a. S. P.

[ 11. If one coparcener be disseised of parcel by the other, and after the disseisee is impleaded for the rest, she shall have aid; for this affirms it for a partition, and she shall not come after to defeat the possession of the disseisor against this agreement. 29 Edw. 3. 2. But quære.]

[ 12. If one coparcener be disseised, and not the other, (admit this which cannot be) she that is not disseised, shall have aid of the other which is disseised; for this disseisin is a partition in law.]

(F. a) *At what Time it ought to be demanded.*

[1. **H**E ought to demand it the *first day of the term* that he begins to plead. 2 Hen. 6. 5. b.]

Fitzh. Aid de Roy, pl. 8. cites S. C.

[2. If a plea be adjourned from one term to another, in the other term he shall not have it. 3 Hen. 6. 5. b.]

Fitzh. Aid de Roy, pl. 8, cites S. C.

—S. P. For it ought to be demanded in the former term, and before plea pleaded. P. N. B. 153. (F) in the new notes there (b) cites S. C.

[3. In an *avowry* for a rent reserved upon a partition, if the plaintiff challenges the avowry, he shall not have aid as lessee for life of him in reversion. 16 Ed. 3. Aid 128. adjudged.]

[4. If a man be ousted of aid for one cause, he may have other causes in infinitum the same term to have aid. 3 Hen. 6. 5. b.]

5. In *ejectione firmæ*, after *Not guilty* pleaded, and in another term the defendant prayed in aid of the king's lessees for 99 years of his dutchy lands in trust for the queen, and as bailiff to them, and it was denied by the court. Hard. 179. Pasch. 13 Car. 2. in Scaccario. Anderson v. Arundel.

6. A writ of *dower* was brought, and the tenant pleaded *jointenancy as to parcel*, and judgment was given that he answer over, after which the tenant prays in aid of his 3 daughters, shewing that himself was but tenant by the curtesy, and the reversion in his three daughters. Per cur. aid is not demandable in another term after judgment to answer over. 2 Jo. 6 & 8. Pasch. 23 Car. 2. C. B. Cobham (Lady) v. Tomlinson.

7. In *personal actions* aid cannot be prayed in another term after *imparlance*, because there it is *ad respondendum*, and after such *imparlance* taken no aid lies; per the Ch. Baron. Hardr. 179. Pasch. 13. Car. 2.

(G. a) *At what Time it shall be granted. Where [ 239 ] before any Plea pleaded, and where not.*

[1. **I**N a *replevin* brought by lessee for life, if the defendant avows upon W. as upon his tenant, and the plaintiff pleads that W. leased to him for life, he shall not have aid of W. before any plea pleaded. 32 Edw. 3. Aid 41. adjudged. Contra 8 Hen. 2. Aid del Roy 117. agreed. But if he pleads *Hors de son fee*, he shall have aid of him in reversion. 32 Edw. 3. Aid 41. adjudged.]

[2. In *trespass* by lessee for years, if the defendant avows upon J. S. as upon his very tenant for certain services arrear, the plaintiff shall not have aid of J. S. before any plea pleaded. 8 Rich. 2. Aid del Roy 117. adjudged, because it is but a termor, and has not the freehold (it seems not to be law.)]

(\*) Fol. 186.

[ 3. In trespass, if the defendant avows for that the usage of the vill of D. is, that if any one erects a fold within the town, the lord of the town may take it, saving the abbot of C. who has a house and land, by reason of which he is to have a fold, and 40 sheep, and if he has more the lord may take them, and alleges that the abbot leased the house and land to the (\*) plaintiff for certain years, and he put in 7 sheep above the 40, for which, he [the defendant] being lord of the town, took them, &c. the plaintiff shall have aid before any plea pleaded. 8 Rich. 2. Aid del Roy 117. adjudged.]

Fitzh. Aid  
de Roy, pl.  
118. cites  
Pasch. 8 R.  
2. S. C.

[ 4. In a replevin, if the defendant avows upon J. S. as upon his very tenant, the plaintiff being lessee for years of J. S. shall have aid of him before any plea pleaded; for they may join. Contra 8 Rich. 2. 118. adjudged.]

(H. a) At what Time it shall be granted. Before  
Issue who shall have Aid.

Fitzh. Aid,  
pl. 114. cites  
S. C. & S. P.

[ 1. A Bailiff shall not have aid before issue. 43 Edw. 3. 13. b.]

—Bendl. 180. in pl. 224. S. P. in Marg.

S. P. in tres-  
pass. Br.  
Aid, pl. 33.  
cites S. C. but not before issue.

[ 2. And so 46 Edw. 3. 11. b. where the issue is, whether it be the freehold of his master.]

S. P. per  
Huls. Br.

[ 3. So of the servant. 8 Hen. 4. 14.]

Aid, pl. 45. cites 8 H. 4. 17. S. P. — See (I. a) pl. 34 S. C.

Br. Aid, pl.  
26. cites  
S. C. —  
Fitzh. Aid,  
pl. 114. cites S. C.

[ 4. A baron shall have aid of his feme before issue, where the avowry is upon him and his feme in the right of the feme. 43 Edw. 3. 13. b.]

[ 5. But otherwise it is if he avows upon the baron only, as in the right of the feme. 29 Edw. 3. 24.]

[ 240 ]

[ 6. In a replevin by the husband, if the avowry be made upon a stranger, the husband may say that he hath nothing but in the right of his wife, who is tenant in dower, the remainder over to a stranger, and shall have aid of his wife before other plea pleaded. 19 Edw. 3. Aid 143. adjudged.]

[ 7. In a replevin, if the defendant avows upon the plaintiff for certain services as bailiff of J. S. to which the plaintiff says, that A. whose estate the defendant hath in the seignior, released to B. whose estate he hath in the tenancy, the plaintiff [defendant] shall have aid of J. S. without more pleading. 24 Edw. 3. 25.]

Fitzh. Aid,  
pl. 43. cites  
S. C.

[ 8. So if the bailiff avows upon the plaintiff for services, and the plaintiff traverses the seisin, yet the bailiff shall not have aid before issue joined. 30 Edw. 3. 19. adjudged.]

[ 9. In

[9. In debt for the arrearages of an annuity against a parson, if the defendant says he found the church discharged, he shall have aid before any plea pleaded. 2 Hen. 6. 8. b. adjudged.] Br. Aid, pl. 4. cites S. C. not S. P.

[10. In a replevin, if the defendant avows for damage-feasant, as in the right of his wife in certain lands, he shall not have aid before issue joined. 7 Edw. 4. 2. b. Curia.] S. P. but otherwise it is per Moile and Jenny, in avowry

by the baron for rent-service or suit of court in jure uxoris, or of the claim of a villein in homine replegiando in jure uxoris; for these are real, and the damage-feasant is personal. And per Danby and Catesby, if a bailiff justifies or makes consuance in jure magistri for rent or service, and the plaintiff pleads a release of the master, the bailiff shall not have aid of his master before issue joined. Contra per Moile. Br. Aid, pl. 129. cites S. C. ——— Fitzh. Aid, pl. 88. cites S. C.

[11. In a replevin, if the defendant makes consuance as bailiff for a rent-charge granted to R. by one H. and the plaintiff says that H. was bound to him in a statute merchant, and after granted the rent to R. and \* [the defendant] prays in aid of R. he shall not have aid before issue joined. 14 Edw. 3. Aid 56. per Curiam. 21 Edw. 3. Aid 183. adjudged.] \* Those words are in Fitzh. Aid, pl. 56.

[12. In a replevin, if the defendant avows for a rent-service, as lessee for life, the reversion to J. S. to which the plaintiff pleads Hors de son fee, the defendant shall not have aid of him in reversion before he hath joined. 29 Edw. 3. 40. adjudged.] If tenant for life or years makes avowry, or bailiff makes consuance for rent.

service or rent-charge, and the plaintiff traverses the avowry, or says Hors de son fee, or in rent-charge, that he who charged had nothing at the time of the charge, or in consuance for damage feasant, in these cases, &c. they shall have aid after issue joined; for peradventure he of whom aid is prayed may estop the plaintiff. Ibid. cites Pasch. 21 E. 3.

And if guardian in socage in right of the heir pleads Hors de son fee, he cannot have aid till after issue joined. Ibid. cites M. 30 E. 3.

[13. In a replevin, if the defendant avows upon J. S. for services arrear as his tenant, and the plaintiff says, that J. S. leased the land to him for years, and prays aid of him, he shall have it before issue joined, because he is plaintiff. 2 Hen. 6. 1. per Curiam.] Br. Aid, pl. 2. cites S. C. ——— Fitzh. Aid, pl. 50. cites S. C. — S. P. D. 289.

b. pl. 59. Trin. 12 Eliz. ——— See (I. a) pl. 4. S. C.

Replevin, by the opinion of the court the termor for years, plaintiff, shall not have aid of his lessor before issue joined, where the defendant avows for a rent-charge; for he may plead at large. Contra for rent-service, for there he is not privy because the avowry is upon the person, but after issue joined he shall have aid. Pigot was in a contrary opinion; for it may be that the lessor has a release or other deed, which the termor has not to plead. Br. Aid, pl. 131. cites 7 E. 4. 24.

[14. But otherwise it had been, if he had been defendant, for the wrong supposed in him. 2 Hen. 6. 1. Curiam.] Fitzh. Aid, pl. 50. cites S. C. ———

Br. Aid, pl. 2. cites S. C. ——— But ibid. pl. 91. cites 24 E. 3. 3. Contra, that bailiff defendant in replevin prayed aid of his master, and had it immediately, and so had tenant for life the next term in such case. ——— So ibid. pl. 63. cites 21 E. 3. 12. Bailiff defendant had aid of his master before issue joined.

15. In trespass, the defendant said that the place where, &c. is the franktenement of W. N. who leased to him for 10 years, by which he entered, &c. Caund. it is the franktenement of the plaintiff, &c. wherefore the defendant prayed aid of his lessor, and had it, quod [241] In replevin, the defendant avowed because the

place where, quod nota, after issue in trespass, and not before, as appears here, &c. was the Br. Aid, pl. 103. cites 1 H. 6. 3.

ment of J. N. who leased to him at will, and he distrained for damage feasant, and the other said that the place where, &c. was his franktenement, and not the franktenement of J. N. and the defendant prayed aid, and was not suffered to have the aid before issue joined, because by the avowry it appears that it is personal, and therefore is only as an action of trespass; quod nota that in trespass and such avowry the aid does not lie before issue joined, and see that tenant at will had aid. Br. Aid, pl. 139. cites 10 H. 6. 27.

In replevin, the defendant justified as his franktenement for damage-feasant. The plaintiff said that J. S. was seized in fee, and leased to him for years, and prayed aid. Per Heydon, he shall not have aid before issue joined. But otherwise it is where he avows for rent. But the Reporter says he shall have aid in both cases before issue joined. Br. Aid, pl. 126. cites 5 E. 4. 2.

16. Aid is not grantable after plea to the action in the case of a common person; per Vaughan Ch. J. 2. Jo. 8. cites 3 H. 6. 1. and 5.

17. A man leased to W. for life rendering rent, and after granted the reversion to J. S. tenant of the king of other lands in fee, which J. S. died his heir within age, and in ward of the king, the tenant for life in avowry may have aid of the heir after issue joined, but not of the king. Br. Aid, pl. 80. cites 21 H. 6. 11.

18. Aid of the king in trespass shall be before issue joined, but of a common person it may be after issue joined. Br. Aid, pl. 125. cites 5 E. 4. 1.

Fol. 187. (I. 2) At what Time it shall be granted. Before Issue in what Actions.

[ 1. ] In replevin, if the defendant avows as an assignee of a rent reserved for equality of partition, the plaintiff being lessee for life, shall have aid before issue. 15 Edw. 3. Aid 34. adjudged. 16 Edw. 3. Aid 128. 130. adjudged.]

\* Fitzh.  
Replevin,  
pl. 4. cites  
S. C. —  
See (I) pl.  
3. S. C.  
† Fitzh.

[ 2. In an avowry upon a stranger aid shall be granted before any plea pleaded to the right, because he being a stranger to the avowry cannot plead in abatement. 44 Edw. 3. 39. b. \* 9 Hen. 6. 27. 15 Edw. 3. Aid 33. adjudged, † 17 Edw. 3. 9. b. adjudged.]

Aid, pl. 133. cites S. C. but says nothing of its being to be granted before issue.

Br. Aid, pl.  
45. cites 8  
H. 4. 17.

[ 3. In replevin the servant shall have aid of his master before plea pleaded. 8 Hen. 4. 15.]

S. P. — See (H. 2) pl. 3. S. P. cites 8 H. 4. 15.

Br. Aid, pl.  
2. cites S. C.  
— Fitzh.  
Aid, pl. 50.  
cites S. C.

[ 4. If lessee for years brings a replevin, and the lord avows upon the lessor, the lessee shall have aid before issue, because he is plaintiff. 2 H. 6. 1.]

Fitzh. Aid,  
pl. 58, cites  
S. C. —

[ 5. In pleas real the tenant shall have aid before plea pleaded and issue taken. 4 H. 6. 30. b.]

In real actions aid prayer of a common person lies before issue joined, because there the title of him in reversion or remainder appears by the plea, for without shewing it he cannot draw his plea; per the Ch. Baron. Hard. 179. Pasch. 13 Car. 2. — See pl. 19. contra.

†

[ 6. In



[6. In replevin, if the defendant *avows as bailiff to J. S. for certain services*, if the plaintiff says that the place where, &c. is not held by the services alleged, but by fealty only, the bailiff shall have aid before issue, because after issue joined the lord when he comes cannot alter it. 21 Ed. 3. 12. b. adjudged.]

[7. In replevin, if the defendant says, that the place where, &c. is the freehold of a stranger, who leased to him at will, and he took it damage feasant, if the plaintiff says that it is his freehold, *absque hoc* that it is the freehold of a stranger, yet the defendant shall not have aid before issue joined, because this replevin is but merely in the personalty as a trespass. 10 Hen. 6. 26. b.]

Br. Avowry, pl. 117. cites S. C.

[8. In pleas personal, the defendant shall not have aid before plea pleaded. 4 Hen. 6. 30. b.]

Fitzh. Aid, pl. 58. cites S. C.

See pl. 12. and the notes there.

[9. In trespass the defendant shall not have aid before plea pleaded. 8 Hen. 4. 15. Nor \* before issue in trespass. † 10 Hen. 6. 26. b.]

\* Br. Avowry, pl. 117. cites S. C.

pl. 45. cites 8 H. 4. 17. — Ibid. pl. 13. cites 28 H. 6. 13. S. P. — S. P. 125. cites 5 E. 4. 1.

In trespass the defendant justified, because J. was seized of such land, and had common appendant in the place, &c. time out of mind, and that J. leased to the defendant for years, and he used the common, &c. and the plaintiff traversed the prescription, by which the termor prayed aid of J. his lessor, and had it; quod nota, after issue joined in trespass, and of the king in trespass, the aid shall be before issue joined. Note a diversity. Br. Aid, pl. 21. cites 40 E. 3. 21.

[10. After plea pleaded to the action, a man shall not have aid. 4 Hen. 6. 30. b. In actions real the defendant shall † not have aid before issue. 26 Hen. 6. Aid 77.]

As where bailiff makes confusion, and does not pray aid in

the conclusion of his cognizance, and the plaintiff replies thereto, the defendant shall not pray aid after the replication. Br. Laches, pl. 5. cites S. C. — Fitzh. Aid, pl. 58. cites S. C.

† [The word (not) is put in by mistake of the printer, and is contrary to the book cited. And see pl. 5. in the affirmative.]

[11. If aid be prayed of the patron and ordinary, and the estate of the patron is counterpleaded, the \* patron shall not have aid of the ordinary before the issue determined, for if this be found for the plaintiff, he shall have judgment presently; (quære this) and if with the defendant he shall have aid of the patron and ordinary infimul. 7 Hen. 6. 41.]

\* S. P. per Brown. Br. Counterple de Aid, pl. 10. cites S. C. that he shall attend till the issue be

tried to have aid of the ordinary. — S. P. per Browne, Clerk, which Babington J. held for law, and none denied it. Br. Aid, pl. 73. cites S. C. — Br. Joinder in Aid, pl. 12. cites S. C. — Br. Process, pl. 139. cites S. C. — See (N. a) pl. 9. and (S. a) pl. 3.

[12. In actions personal the defendant shall not have aid before issue joined. 26 Hen. 6. Aid 77.]

S. P. and there the prayee does

nothing, but shall give in evidence in maintenance of the issue, and shall not plead, but contrary in plea real. Br. Joinder in Aid, pl. 14. cites 19 H. 6. 6. — In personal actions aid does not lie of a common person till after issue joined upon the right of the matter, but not upon the general issue; because it does not appear to the court whether the right will come in question or not, and if it does not there is no cause of aid; per Ch. Baron. Hard. 179. Pasch. 13 Car. 2. in the Exchequer.

[13. As aid does not lie in a replevin before issue. 26 Hen. 6. Aid 77.]

(K. a) Aid

**Fol. 188. (K. a) Aid after Aid. In what Cases Aid shall be granted after Aid.**

**Fitzh. Aid, pl. 134, cites S. C.** [ 1. ] *If one coparcener has aid of his brother upon partition between them, and he makes default, the other shall have aid of his uncle upon a partition made between his father and uncle, and so in infinitum after paramount, because if his brother had appeared they both should have had aid, and his default shall not prejudice him. 17 Edw. 3. 12. b.]*

**Fitzh. Aid, pl. 142, cites S. C.** [ 2. If one coparcener has aid of B. her coparcener, and the other coparceners, and they make default, she shall not have aid of the heirs of B. and other coparceners, because B. and the others made default before. 18 Ed. 3. 31.]

**Fitzh. Aid, pl. 135, cites S. C.** [ 3. If a man has aid of the king because of his charter, by which it is given in exchange for life, after a procedendo he shall have aid of him in remainder, because he could not answer without aid of the king, though this aid be in lieu of a voucher. Mich. 17 Edw. 3. 12. b.]

[ 4. If there be lessee for life, the remainder to a priory, which priory is of the foundation of the king, and the lessee has aid of the king, because there was not any prioress at the time, so the right to the king, and after a procedendo comes, and then a prioress is made, the lessee shall not have aid of her. 32 Edw. 3. Aid 39. adjudged.]

**Fitzh. Aid, pl. 8, cites S. C.** [ 5. In a replevin, if the plaintiff, being lessee for life, bath aid of him in remainder, who comes not at summons, and after the plaintiff is nonsuit, and after the heir of him in remainder grants his remainder over, and the lessee attorns, and after he brings a second deliverance, he shall have aid again in this of the grantee. 25 Ed. 3. 40. b. adjudged.]

**\* Fitzh. Aid, pl. 79, cites S. C.** [ 6. If lessee for life bath aid of him in reversion, and after he in reversion dies, the lessee shall have aid of his heir. \* 31 H. 6. 10. † 21 H. 6. 38. b.]

† If in trespass against me for spoiling his grass, I plead that M. was seised of two acres in D. to which he had common appendant in the place where, &c. and after leased the land to me for life, and I put in my beasts to common there, and give colour to the plaintiff, &c. whereupon the plaintiff replies that it was and is his several, and traverses the right of common in M. or any others, &c. and so to issue, whereupon I pray aid of M. and M. dies, I shall have aid of his heir. For his heir shall have as great damage, and as great avail, and is in the same mischief as his father was. 21 H. 6. 38. b. pl. 4. per Paston. But Newton thought that he should not have aid in this case.

[ 7. And if the heir after dies, he shall have aid of his heir. 21 Hen. 6. 38. b.]

**Fitzh. Aid, pl. 79, cites S. C. & S. P.** [ 8. If a parson in an annuity bath aid of the metropolitan guardian of the spiritualties, as ordinary, &c. the see being vacant of a bishop, and after a bishop is created, he shall not have new aid of him; for now the metropolitan hath the same right in his person which he had before. 31 Hen. 6. 10.]

[ 9. If

[9. If a *parson hath aid of the ordinary*, and after the *ordinary dies*, the *parson shall not have aid of the metropolitan guardian of the spiritualties*. 31 H. 6. 10. *said to be adjudged.*]

Fitzh. Aid, pl. 79. cites S. C. & S. P.

[10. So if a *parson hath aid of the ordinary*, who *dies*, he shall not have aid of his *successor*; for the *successor* comes not in from the predecessor. 31 Hen. 6. 10.]

Fitzh. Aid, pl. 79. cites S. C. & S. P.

[11. If *tenant at will*, according to the *custom*, hath aid of a *bishop*, whose *tenant* he is, and after, when the *inquest* appears, he *shows that the bishop is dead*, and that the *king hath the temporalities*, and the *manor* of which he himself holds, so that he holds of the *king* as of the *said manor* during the *voidance*; yet he shall not have aid of the *king* for the *mischief*, that by such means the *plaintiff* should be *delayed* perpetually. 21 Hen. 6. 37. 39. *adjudged.*]

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Br. Aid, pl. 82. cites S. C. & S. P. accordingly; for there is no privity between him and the king, and

the thing does not lie in custom, because it is repugnant; for when the *bishop* dies, the will is determined; but it was held nevertheless, that if the copy had been tenendum to him and his heirs of the *bishop* and his successors, by express words, then he might have aid of the successor; and therefore now he is only tenant at sufferance, ut videtur. — Br. Aid del Roy, pl. 46. cites S. C. — Br. Tenant by Copy of, &c. pl. 4. cites 21 H. 6. 37. — Fitzh. Aid de Roy, pl. 22. cites S. C.

[12. In an *action for land against baron and feme, lessees for life in the right of the feme*, if they have aid granted of him in *reversion*, who comes not upon the *summons*, by which the *baron and feme* are put to answer, and after the *feme* is received upon the *default of the baron*, she shall have aid again of him in *reversion*. 12 R. 2. Aid 123. *adjudged.*]

Fol. 189.

[13. In an *avowry for a rent reserved for equality of partition*, if the *plaintiff lessee for life* hath aid granted of him in *reversion*, who makes *default* upon the *summons*, upon which the *plaintiff* is *adjudged to answer alone*, and after he in *reversion* dies, the *plaintiff* shall not have aid of his *issue*, because he was *adjudged to answer alone* before. 16 Edw. 3. Aid 128. *adjudged.*]

[14. But there he had also demanded judgment of the *avowry*, after the *default of the first prayee.*]

[15. But in this case, if the *plaintiff* be *nonsuit*, and after *sues a second deliverance*, and the *defendant avows as before*, the *plaintiff* shall have aid of the *heir*, though he was *adjudged to answer alone* in the first *action*, because this *second deliverance* is in lieu of a *new original*. 16 Edw. 3. Aid 131. *adjudged.*]

Br. Aid, pl. 147. cites 10 H. 7. 19. where the avowry was upon a stranger,

aid was granted again, though the second deliverance be not but writ judicial depending upon the first original.

16. After aid granted in *attaint* the *baron* and he in *reversion* made *default after the issue joined*, and the *feme* prayed to be received, and was received, and prayed aid again, and had it. Quod nota bene. Br. Aid, pl. 111. cites 40 Aff. 20.

17. *Scire facias* against a *parson*, upon recovery of *annuity* in writ of *annuity against his predecessor*, who said that he was presented by J. to the church discharged, and prayed aid of him and of E. the *ordinary*, and had it, notwithstanding that his *predecessor* who last had aid of the *ancestor of J. patron* in the first *action*. Br. Aid, pl. 24.

pl. 24. cites 41 E. 3. 20. and cites 29 E. 3. Fitzh. Scire facias 152. contra.

18. A man shall *not* have aid *twice for one and the same cause*, but for a new cause of later time he may have aid de novo. Br. Aid, pl. 9. cites 9 H. 6. 3.

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19. *Scire facias by the master of an hospital against a parson of D. to have execution of an annuity recovered by S. late master, against R. late parson, who prayed aid of the patron and ordinary, and had it, and process continued till the ordinary appeared, and the patron made default; and in the writ of annuity the plaintiff made title by prescription, that he and his predecessors, time out of mind, have been seised of the annuity by the hands of the parsons of D. for the time being, time out of mind, in which action the parson defendant prayed aid of the patron, and had it; and upon process he appeared, and joined, and traversed the prescription, and found for the plaintiff, and he had judgment to recover, and he died, and the plaintiff was made master, and the defendant died, and this parson was made parson; and the ordinary and the parson said that he ought not to have execution; for they said that all the petit jurors which passed, &c. are dead, and traversed the prescription again as above, judgment if execution; and the opinion of the whole court was, That he shall not have the plea, because it was once tried, and the successor may have writ of error or attain, and it is his folly if he passed the time till all the petit jurors are dead. Quod nota. Br. Aid, pl. 78. cites 19 H. 6. 39. and in the principal case here it was awarded after, the same year, fol. 75. that the plaintiff should recover the annuity. Quod nota.*

(K. a. 2) What shall be a good Counterplea. To the Estate of the Prayor.

\* Fitzh.  
Issue, pl.  
153. cites  
S. C. & S. P.

[ 1. **T**HE cause of the aid may be traversed, as if it be pleaded that J. leased to him, &c. it is a good traverse that J. did not lease to him. 44 E. 3. 39. b. 41. b. 3 H. 6. 10. 7 H. 6. 25. b. 19 H. 6. 21. b. 18 E. 3. 28. b. Contra 11 H. 4. 42. b.]

Br. Coun-  
terplea de  
Aid, pl. 2.  
cites S. C.  
per Martin  
and Palton;  
but they

[ 2. But it is not a good counterplea that he had nothing of the lease of the prayee the day of the writ purchased, nor after; for this may be true, and yet he shall have aid; as if he had leased to him, and he had granted it over before the writ purchased, and that he purchased it again pending the writ. 3 H. 6. 9. b.]

agreed that nothing of his lease generally is a good counterplea. Quære the diversity. — — — Fitzh. Counterple del Aid, pl. 7. cites S. C. accordingly. — — — Fitzh. Issue, pl. 153. cites 44 E. 3. 39. S. P.

Præcipe  
quod reddat  
against te-  
nant for life,  
who prayed  
aid of him

[ 3. It is no good counterplea that the lessee had nothing of the lease of the prayee the day of the writ purchased; for if he had nothing in the land when the writ was purchased, but pending the writ purchased it for life, yet he shall have aid. 21 E. 3. 44.]

in reversion. The demandant said, that he had nothing of the lease of the lessor the day of the writ purchased; judgment; & non allocatur; for if he purchases for life pending the writ, he shall have aid. Br. Aid, pl. 69. cites 46 E. 3. 46.

[4. It is a good counterplea that the lessee hath a fee. 41 E. 3. Br. Counterple de Aid, pl. 4. 8. b. 11 H. 4. 43.] S. P. cites 41 E. 3. 7.

[5. So it is a counterplea that the lessee was seised in fee the day of the writ purchased. \* 3 H. 6. 9. b. † 17 E. 3. 5. b. adjudged. 21 E. 3. 44. For if he had aliened pending the writ, and repurchased, this is no cause of aid. 50 Aff. 3.] \* Fitzh. Counterple de Aid, pl. 7. cites S. C. & S. P. admitted by Issue. † Fitzh. Counterple de Aid, pl. 2. cites S. C. & S. P. adjudged.

[6. If the tenant prays in aid, because A. his wife was seised in fee, and had issue by him B. and died, and he is tenant by the curtesy, and so prays in aid of B. in reversion, it is a good counterplea that J. S. enfeoffed the tenant and his wife in fee of the land, sans ceo that he holds now by curtesy. \* 40 Aff. 37.] Br. Counterple de Aid, pl. 4. [246] cites 41 E. 3. 7. Br. Aid, pl. 22. cites 40 E. 3. 37. and 41 E. 3. 7. \* Br. Counterple de Aid, pl. 29. cites S. C. For he is in of other estate. — Fitzh. Voucher, pl. 207. cites S. C.

[7. If the defendant shews a seisin in his wife, and another as coparceners in fee, and that he had issue by her, and that he is tenant by the curtesy after the death of his wife, and so prays in aid of the heir in reversion, it is no counterplea that the wife had nothing, &c. in the land during the coverture, without denying the seisin of the other in coparcenary, or shewing a discontinuance or alteration of the estate. 21 E. 3. 15. b. adjudged.] Br. Aid, pl. 65. cites 21 E. 3. 14.

[8. But it had been a good counterplea that the wife and the others never had any thing in the land, &c. 21 E. 3. 15. b. Issue.] Fol. 190. Br. Aid. pl. 65. cites 21 E. 3. 14.

[9. It is not a good counterplea that the lessee hath departed with his estate pending the writ. 23 E. 3. 21. b.] Fitzh. Aid, pl. 6. cites S. C.

10. In assise two judgments were vouched, where the tenant pending the assise, or præcipe quod reddat against him, aliened the land, and yet prayed aid, and had it. Quære if the prayee might not refuse to join in aid, by reason of the alienation. Br. Aid, pl. 109. cites 12 Aff. 41.

11. In scire facias upon a fine, the tenant shewed that she had land in dower, and exchanged it for this land, and so she held for life, the reversion to R. and prayed aid of R. Finch. said that she did not hold in exchange, prist, and a good issue; per Thorpe Ch. J. Br. Counterple de Aid, pl. 15. cites 39 E. 3. 1.

12. In dower one coparcener prayed aid of the other after partition. The demandant said that her baron died seised, absque hoc that the ancestor of the parceners ever had any thing after the death of her baron in demesne or in reversion; & non allocatur, but the aid granted. Br. Counterple de Aid, pl. 17. cites 39 E. 3. 4.

13. In replevin the defendant avowed as his franktenement for damage feasant. The plaintiff said that J. N. was seised in fee, and leased to him for years, and prayed aid of the lessor. The defendant said that it is his franktenement, absque hoc that J. N. leased

leased it; and a good counterplea. Br. Counterple de Aid, pl. 21. cites 5 E. 4. 2.

14. It is a good counterplea to an aid-prayer to say, *that he claims under the same title, and in affirmance of it*; per Hale Ch. Baron. Hardr. 179. Pasch. 13 Car. 2.

(L. a) [Counterplea. Good.] To the Estate of the Prayee.

Br. Counterple de Aid, pl. 34. cites S. C.—  
† Fitzh. Aid, pl. 44. cites S. C.—

[1: **NOTHING** in reversion is a good counterplea of aid; for peradventure a stranger entered upon the lessee, and the lessor released to him, and the Lessee re-entered, or a stranger recovered the reversion against the lessor. \* 41 E. 3. 8. b. 11 H. 4. 42. b. Quære. 4 H. 6. 5. † 30 E. 3. 26. b.]

In scire facias upon a fine, the tenant shewed that J. made a feoffment to the tenant and to J. N. and to the heirs of J. N. which J. N. is dead, and he prayed aid of his heir to whom the reversion belonged, to which the demandant said that the heir had nothing in reversion. Per Marten, it is a good plea upon rescit; contra upon aid prayer; for there the cause shall be traversed. Br. Counterple de Aid, pl. 3. cites 3 H. 6.

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[2. If a man says that J. was seised, and leased to him for life, the remainder to B. and prays in aid of B. it is a good counterplea that J. never had any thing in the land. 18 E. 3. 28. b. Dubitatur.]

Br. Counterple de Aid, pl. 10. cites S. C.

[3. If aid be prayed of the patron and ordinary, it is a good counterplea to the aid of the patron that he had nothing in the patronage the day of the writ purchased, nor ever after. 7 H. 6. 41.]

[4. So if he says that he hath nothing in the patronage. 18 E. 3. 55.]

5. Scire facias upon a fine, by which the father of the plaintiff gave in tail, saving the reversion, and that the father and the tenant in tail died without issue, and prayed execution. The tenant said that she held in dower the reversion to S. and prayed aid of him; Seton, shew how he has the reversion, & non allocatur, by which the plaintiff said that S. after the death of the tenant in tail without issue, endowed the tenant, against which S. we have recovered the 2 parts of the tenements, and yet non allocatur, for by the recovery of 2 parts, the reversion of the 3d part is not divested from him, wherefore the aid was granted. Br. Aid, pl. 64. cites 21 E. 3. 12.

6. If bailiff makes consuance in replevin, and prays aid, it is a good counterplea to the aid for the plaintiff to say, *that the lord granted over the seignior for term of years, which term yet continues, or to say Hors de son fee*. Br. Counterple de Aid, pl. 26. cites 24 E. 3. 45.

Br. Counterple de Aid, pl. 33. cites S. C.

7. Entry in nature of assise; the tenant said that J. S. was seised in fee, and leased to him for life, and prayed aid of him; for the aid lies in this action, and yet not in assise. And the demandant said that he was seised till by the tenant disseised, which estate he continued till the writ purchased, and pending the writ he enfeoffed the same J. S.



*J. S. who leased to him for life, absque hoc that he held for life of the lease of J. S. the day of the writ purchased, and by judgment he was ousted of the aid. Br. Aid, pl. 123. cites 4 E. 4. 14.*

**(M. 2) [Counterplea. What is a good Counterplea.] To the Estate of the Prayor.**

[1. **I**N a writ of dower, if the tenant says that he is tenant by the curtesy, the reversion to J. and prays in aid of J. it is a good counterplea that the tenant was the first who entered after the death of the husband of the demandant, who died seised of the land. 2 E. 2. Aid 160. adjudged.]

[2. In a mortdancer of the death of C. if the tenant says that C. leased to her and her husband, and to the heirs of the husband, and so prays in aid \* [of the heir] of the husband, it is a good counterplea that the said C. is the ancestor, of whose death he brings the action, and that the tenant was the first who abated after the death of C. 6 E. 2. Aid 169. adjudged.]

\* Fitzh. Aid, pl. 169. cites 16 E. 2. and has these words (of the heir.)

3. In assise 2 judgments were vouched, where the tenant pending the assise or præcipe quod reddat against him aliened the land, and yet prayed aid, and had it; quære if the prayee may refuse to join in aid by reason of the alienations or not. Br. Aid, pl. 109. cites 12 Aff. 41.

4. In dower, feme tenant for life was received in default of her baron, and said that J. was seised, and leased to her for life, the remainder to R. and prayed aid of him; and per cur. she shall have the aid without shewing deed of remainder; for all may be by livery without deed, by which the demandant counterpleaded that J. did not lease for life, and the issue accepted, but by some it ought to be that *Ne lessa pas modo & forma prout, &c. the remainder to R. in fee prout, &c.* and this goes to all, for the other is negative pregnant by others. Br. Counterple de Aid, pl. 11. cites 22 H. 6. 2.

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**(N. a) [Counterplea. What is a good Counterplea.] To the Estate of the Prayee.**

[1. **I**F lessee for life prays in aid of J. S. in reversion, it is no good counterplea that the reversion is to J. S. and a stranger, shewing how, and so he ought to have aid of both, for this is nothing to the demandant, for the delay is all one to him. 39 E. 3. 4. b.]

Br. Counterple de Aid, pl. 16. cites S. C.— Fitzh. Counterple de Aid, pl. 19. cites S. C.

[2. If one coparcener prays in aid of the other, because their ancestor was seised in fee, and died seised, and she entered, &c. it is no counterplea

Br. Aid, pl. 65. cites S. C.—

Fitzh. Aid, pl. 21. cites S. C. — *terplea that their ancestor did not die seised; for if he was seised at any time she hath cause to have aid.* 21 Edw. 3. 15. b.]

Br. Counterple de Aid, pl. 65. cites S. C. and it was in scire facias upon a fine, the one coparcener prayed aid of the other, the plaintiff shewed that he claimed by the fine of the ancestor paramount, and therefore it is to defeat their estate, and yet no counterplea.

Br. Aid, pl. 65. cites S. C. — [3. But it is a good counterplea in this case, that the ancestor never had any thing. 21 Edw. 3. 15. b.]

Br. Counterple de Aid, pl. 6. cites S. C. — Fitzh. Aid. pl. 21. cites S. C.

[4. In a writ of dower, if the defendant says that the land descended to her and A. her sister, as coparceners, from J. their brother, and of which they have made partition, and prays in aid of A. it is no good counterplea by the demandant, that her husband died seised sans ceo that J. ever had any thing in the land after the death of the husband. 39 E. 3. 4. b. adjudged.]

[5. So in this case it is no good counterplea that J. never had any thing in demesne or reversion after the death of the husband. 39 E. 3. 4. b. adjudged.]

Fol. 101. [6. If the tenant in an action for certain land says, that the king by his charter gave the manor of S. of which this land is parcel, to R. and the tenant his wife, and to the heirs of R. and so she is but tenant for life, the reversion to the heirs of R. and prays in aid of the heir, it is no counterplea to say this land is not parcel of the manor, for by this counterplea she would avoid the king's charter. 20 E. 3. Aid. 1. adjudged.]

[7. But if certain land be demanded, and the tenant says, that he is tenant for life, the reversion to B. by fine of the manor of D. of which the land in demand is parcel, it is a good counterplea that this land is not parcel of the manor. 21 E. 3. Aid 25. adjudged, for this is a direct traverse.]

[249] [8. In a formedon, if the tenant says, that he is lessee for life, the reversion to B. and prays in aid of B. it is no counterplea for the demandant to say, that at another time he sued a scire facias of this against him, and he said the grandfather of the demandant was seised by force of the fine, and so the fine executed, &c. by which plea he acknowledged that he had a fee, and this writ is freshly sued after the abatement of the other. 33 E. 3. Aid del Roy, 106. adjudged.]

See (I. a) pl. 11. and (S. a) pl. 3. [9. If a parson prays in aid of the patron and ordinary, it is not sufficient to counterplead the patronage of the patron, for he is to have aid of the ordinary notwithstanding this, and it will be all the same delay to have aid of both as of one. 18 E. 3. 55. but quære.]

**(N. a. 2) Joinder in Aid. In what Cases. And who.**

1. *CUI in vita against tenant for life, who prayed aid of him in reversion, and he was ready to join immediately, and the tenant said that he is another person, and not the prayee; and per cur. this is no issue without making the demandant party, and therefore he was compelled to answer alone, because he would not suffer the demandant to join with him in this issue. Br. Joinder in Aid, pl. 7. cites 21 E. 3. 14.*

2. *If one in replevin denies the taking, and the other confesses the taking as bailiff to the other, and by his command before, and prays aid of him, and has it, the other shall not be suffered to join, because he had refused [denied] the taking before. Quære. Br. Joinder in Aid, pl. 4. cites 42 E. 3. 6.*

3. *21 H. 8. cap. 19. The plaintiffs and defendants in replevin or second deliverance, as well without process as by process, shall from henceforth have like pleas, and like aid prayers, and joiners in aid, and advantages, (disclaimer only excepted) as they might have done by the common law before this act.*

**(O. a) Joinder in Aid. In what Cases Joinder may be without \* Prayer. [Privity.]**

[1. **T**HERE ought to be privity between him that joins, and the other to whom he is joined, otherwise the joinder shall not be suffered. 45 E. 3. 7.]

[2. *As if an avowry be made upon a stranger, the stranger cannot join with the plaintiff if the plaintiff has nothing in the land, for there is not any privity. 45 E. 3. 7. b.]*

[3. *So if an avowry be upon a disseisor, the disseisee cannot join to him for want of privity. 45 E. 3. 8.]*

[4. *But in an avowry upon him that has the freehold, he may join to lessee for years, being plaintiff, for there is sufficient privity. 45 E. 3. 8. adjudged.]*

*Fitzh. Joinder in Aid, pl. 9. cites S. C.—Br. Joinder*

*in Aid, pl. 7. cites S. C.—Avowry was made upon a stranger, who comes and says, that he leased to the plaintiff for years by parol, which term yet continues, and they joined in plea without praying aid of him; per cur. the joinder is good, though the lease is by parol, so that the lessee cannot have action of covenant to discharge him. Br. Joinder in Aid, pl. 18. cites 39 H. 6. 7.*

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[5. *But he that has the freehold cannot join to lessee at will, (for the feebleness of his estate, as it seems.) 45 E. 3. 7. b.]*

*Fitzh. Joinder in Aid, pl. 9. cites*

*S. C. & S. P., by Finch. quod Caund. conceffit.*

[6. *If there be lord, mesne, and tenant, and the avowry is upon the mesne, he may join to the tenant. \* 45 E. 3. 7. b. 14 H. 4. b.*

*\* Br. Joinder in Aid, pl. 5. cites*

S. C. & S. P. for he is made privy by the avowry. 17 E. 3. 6. b. 15. b. 39 E. 3. admitted; 34. b. agrees.]

have writ of mesne; and though the termor cannot have writ of mesne, yet he may have covenant, and therefore the joinder good.——Fitzh. Joinder en Aid, pl. 9. cites S. C. and Caund. agreed that the termor in such case may have covenant if the lessor be bound to acquit him; which Finch. agreed.——Where the lord *distrains upon the tenant, and avows upon the mesne*, the tenant shall not have aid of the mesne, because the one has as high estate as the other, but because the mesne is party to the avowry, the mesne may join gratis and plead, or the tenant may have writ of mesne; Quod nota. Br. Aid, pl. 16. cites 34 H. 6. 46.——S. P. for summons in auxilium does not lie, because the tenant who has fee-simple cannot pray aid. Br. Ibid. pl. 8. cites 7 E. 4. 20.——See 9 Rep. 22. b.

S. C. cited [ 7. [But] if there be lord, mesne, and tenant, and the lord avows upon a stranger, the mesne cannot join to the tenant, (and abate the avowry.) 17 E. 3. 6. 15. he may put his cattle in the pound and bring a replevin.]  
9 Rep. 22. b. and so by putting his own cattle in the pound, and then suing a replevin, he may make himself a party.

[ 8. If the avowry be upon a stranger, the donor cannot join to the donee in tail, being plaintiff. 17 E. 3. 6. b. contra.]

[ 9. If there be lord, two mesnes and tenant, and the lord avows upon the first mesne, who is his tenant, the second mesne may join to his tenant. Contra 17 E. 3. 6. b.]

## Fol. 192. (P. a) In what Cases Joinder in Aid shall be, without Process.

Fitzh. Aid de Roy, pl. 24. cites S. C. and says that Mich. 29 H. 6. it was adjudged accordingly. [ 1. ] If a bailiff hath aid of the queen, process shall be awarded against the queen as against a common person. 28 H. 6. 13. adjudged.]

\* Br. Aid, pl. 26. cites S. C.——Fitzh. Aid, pl. 114. cites S. C.——† S. P. But process may be awarded against her; [ 2. If the husband hath aid granted of his wife, he shall be commanded by the court to have his wife at the day in court, without process made against the wife. \* 43 E. 3. 13. b. † 7 H. 6. 45. † 9 H. 6. 26. b. 29 E. 3. 24. because she is amenable at the will of the husband, and process would be a delay. ¶ 35 H. 6. 10. adjudged, and also it may be granted at the election of the court. \*\* 7 H. 6. 45. ¶ 35 H. 6. 10.]

for the one and the other is good enough. Br. Aid. pl. 74. cites S. C.

† Br. Aid, pl. 10. cites S. C. ¶ Br. Joinder in Aid, pl. 9. cites S. C.——Fitzh. Aid, pl. 82. cites S. C. \*\* Br. Baron, pl. 46. cites S. C.——Br. Process, pl. 65. cites 21 H. 6. 22. S. P.——Fitzh. Process, pl. 77. cites Trin. 7 H. 6. 75. S. P.  
¶ Br. Aid, pl. 17. cites S. C.——Br. Aid, pl. 81. cites 21 H. 6. 22.

[ 251 ] [ 3. In replevin by lessee for years, if he hath aid granted of the lessor, upon whom the avowry is made, the lessor may join without process. 2 H. 6. 1.]  
Fitzh. Joinder en Aid, pl. 2. cites S. C.

In replevin the defendant avowed upon W. who had leased to the plaintiff for years, and the lessor is ready in court the day of the avowry made, to join to the lessee, yet if the lessee will not pray aid of him, the lessor shall not be suffered to join; quod nota; quod conceditur arguendo. Br. Joinder in Aid, pl. 10. cites 11 H. 4. 28.

[ 4. If

[4. If the *tenant brings a replevin*, and the *lord avows upon the mesne*, and aid is granted of the mesne, he may join without process, because otherways the tenant shall have a writ of mesne against him if he loses. 2 H. 6. 1.] See (O. a) pl. 6. and the notes there.

[5. If a *bailiff makes conusance in the right of his master*, and hath aid of him, the master cannot join without process. 2 H. 6. 1.]

[6. So in *false imprisonment*, if the *defendant justifies that the plaintiff is the villein of J. S. and that by his command, &c.* if the *issue be whether he be free*, and the defendant hath aid of his master, yet he cannot join without process. 1 H. 6. 2.]

[7. In an *avowry upon B. as tenant*, if the *plaintiff says that A. was seised and leased to him for years*, although he shall not have aid upon this plea, yet *A. may join to abate the avowry*. 3 H. 6. 54.]

[8. In a *plea of land*, if the *tenant hath aid of one within age*, the prayee may join without process. 7 H. 6. 45. b.]

[9. In a *plea of land against lessee for life*, if aid be granted of him in *reversion*, he may join without process. \* 21 E. 3. 14. † 28 E. 3. 94. b. adjudged, 32 E. 3. Aid 38.] \* Fitzh. Joinder en Aid, pl. 11. cites S. C.  
† Fitzh.

Joinder in Aid, pl. 13. cites S. C.—Tenant for life of a feignory may make avowry, and immediately pray in aid of him in reversion upon the same avowry. Br. Aid, pl. 10. cites 9 H. 6. 25. per Paston. Nota.

[10. But in this case, if he in *reversion prays to join*, and the *lessee says that he is not the same person* of whom he hath prayed in aid, the lessee shall be ousted of aid, and shall answer alone. 21 E. 3. 14.] Fitzh. Joinder in Aid, pl. 11. cites S. C.

[11. In a writ of *error against tenant by the curtesy, and the heir of the recoveror*, if aid be granted of the heir in reversion for the tenant by the curtesy, the heir shall not be received to join in aid to the tenant by the curtesy without process, though he be present in court. 47 Aff. 9. adjudged. Quære this.] Br. Aid, pl. 115. cites S. C. and is of tenant for life; but the words (tenant by

the curtesy) are not mentioned there.——S. P. accordingly; and Brooke says the reason seems to be, inasmuch as covin may be between the plaintiff and the tenant for life. Quære. Br. Joinder in Aid, pl. 17. cites 47 E. 3. 9.——See (A) pl. 24. reason seems to be. Quære. Br.

[12. In a *scire facias to execute a recognizance upon a return of the conusee dead*, if a writ issues to warn his heir, and the *sheriff returns the heir and B. as tertenants warned*, and aid is granted to *B. lessee for life of the heir in reversion*, (admitting this) yet no process shall be awarded against the *heir to join in aid*, because he is *party to the writ before*. 8 R. 2. Aid del Roy 114.]

13. Joinder may be the \* *first day* without process; but not at another day where the prayee is in proper person, but they cannot join by *attorney* without day given upon process. Br. Joinder in Aid, pl. 7. cites 21 E. 3. 14. agreed. The same diversity, and in the last case there must be process

and day in court. Br. Joinder in Aid, pl. 16. cites 1 H. 6. 4.——Fitzh. Joinder in Aid, pl. 1. cites S. C. \* Br. Joinder in Aid, pl. 1. cites Trin. 26 H. 8. 6. S. P.

(Q. a) How the Joinder shall be *without Process*.  
By *Attorney*.

Br. Aid, pl. 47. cites S. C. but Brooke  
[ 1. ] *If lessee for years hath aid of the lessor upon whom the avowry is made, the lessor may join in aid by attorney. 11 H. 4. 28. b.]*

says Quod mirum, that it had not been in person, or by attorney upon process.—Br. Joinder in Aid, pl. 6. cites S. C. accordingly.—Ibid pl. 10. cites S. C. but S. P. of joining by attorney does not appear.—Fitzh. Attorney, pl. 35. cites S. C. and S. P.—Dy. 111. pl. 43. Hill. 1 & 2 Mar. DORMER v. CLARK, tenant for life prayed in aid of him in the reversion who came in by process, and by his attorney joined in aid.

Fol. 193. [ 2. *But the mesne shall not join to the tenant by attorney, because by the joinder he acknowledges an acquittal, and therefore ought to join in person. 11 H. 4. 28. b.]*

[ 3. *So where an avowry is upon a stranger, and aid granted of him, he cannot join by attorney without process. 1 H. 6. 4. b.]*  
S. P. Br. Aid, pl. 81. cites 21 H. 6. 22. and he had process to bring her in, and this before answer made, or issue joined.  
4. *Avowry for rent and services upon baron and feme, as in jur uxoris, the baron prayed aid of his feme, and had it, and day given to him to bring in his feme without process, but he might have had process if he would; Quod nota. Br. Aid, pl. 17. cites 35 H. 6. 10.*

## (R. a) Joinder in Aid by Process. [What Process.]

Br. Process, pl. 38. cites S. C. but by the prothonotaries both summons ad auxiliandum, and also sci fa. ad auxiliandum have been used, but by Thirne, and the opinion of the court, the ancient course is to award a scire facias, &c.—Fitzh. Process, pl. 124. cites S. C.  
[ 1. ] *In a scire facias, if the tenant lessee for life has aid of the reversioner, a scire facias in auxilium according to the nature of the first writ shall be granted, and not a summons ad auxiliandum. 12 H. 4. 3.]*

## (S. a) At what Time Process shall be granted.

Br. Aid, pl. 45. cites S. C.  
[ 1. ] *If a servant be at issue, and has aid of his master, it is not necessary that the scire facias ad jungendum should be returned before any venire facias shall be awarded, but they may be returnable at one time, because the issue being joined, the prayer cannot alter the issue, but is only to give evidence. 7 H. 6. 21. Contra 8 H. 4. 16. b.]*

† Br. Process, pl. 61. cites S. C.—  
[ 2. *If aid be granted of the king and ordinary, by which he is awarded to sue to the king, yet before a procedendo comes process shall be awarded against the ordinary presently. 12 H. 4. 4. b. though*



though it may be procefs shall not come before the return. Du-  
bitatur. † 19 H. 6. 5. b. 19 E. 3. Aid del Roy 5.]

Fitzh. Pro-  
cess, pl. 87.  
cites S. C.

\* [ 3. If aid be granted of the ordinary, and the estate of the patron  
is counterpleaded, procefs shall not be awarded against the ordinary  
till the issue tried. 7 H. 6. 41.]

See (I. a)  
pl. 11. S. C.  
and see (N.  
a) pl. 9.

[ 4. If aid be granted of a common person, patron and ordinary,  
procefs shall issue against both at the same time. 19 H. 6. 6.]

[ 5. If a parson has aid of the king patron, and of the ordinary,  
and procefs is made presently against the ordinary before any procedendo  
comes, if the ordinary comes in upon the return, he shall not join  
in aid to the parson before the procedendo comes. 19 H. 6. b.  
Curia.]

Fitzh. Pro-  
cess, pl. 87.  
cites 19 H.  
6. 6. S. C.—  
Br. Process,  
pl. 61. cites  
19 H. 6. 5.

and so the (b) in Roll seems misprinted for (6.)

6. In trespass, the defendant said that it was the franktenement of  
R. and he is his tenant at will, and entered, and did the trespass,  
judgment, &c. the plaintiff said that it was the franktenement of  
J. N. who leased to him at will, absque hoc that it is the franktene-  
ment of R. and so to issue, and the defendant prayed aid of R. and  
had it, and venire facias issued, and writ to warn the prayee re-  
turnable at a certain day, at which day the inquest came, and the  
sheriff returned R. nihil, and the defendant testified that he had  
assets, &c. and prayed garnishment, and that the taking of the in-  
quest shall stay, and notwithstanding the inquest was taken, and  
found for the plaintiff, and he recovered damages against the de-  
fendant; Quod nota. Br. Aid, pl. 43. cites 7 H. 4. 31.

Br. Process,  
pl. 135. cites  
7 H. 4. 31.  
32. — Br.  
Enquest, pl.  
13. cites  
S. C.

7. Aid was granted in trespass after issue for one in the writ of  
another named in the writ, and of a stranger, and venire facias is-  
sued immediately upon the issue, and procefs against the prayee  
only, all at one day; for the prayee shall not plead, but shall  
maintain the issue and give evidence. Br. Process, pl. 55. cites  
7 H. 6. 25.

Br. Aid, pl.  
71. cites 7  
H. 6. 71.

8. In trespass they were at issue in C. B. and after aid was grant-  
ed, and there it was doubted whether summons ad auxiliandum  
shall issue with the venire facias or not, and after summons ad  
auxiliandum issued first. Contra in B. R. for there both shall issue  
together. Br. Aid, pl. 136. cites 18 E. 4. 10.

### (T. a) How. By Attorney.

[ 1. ] N an avowry upon the lessor, if the lessee has aid of him,  
the lessor may join by procefs by attorney. 11 H. 4. 28. b.]

[ 2. So where the avowry is upon the very tenant, and aid grant-  
ed of him, he may join by procefs by attorney. 1 H. 6. 4. b.]

## (U. a) How granted without Monstrans or Profert of Deed.

S. P. and then the deed does not belong to the tenant for life. Br. Monstrans, pl. 25. cites S. C.

1. **T**ENANT for life may have aid of him in remainder without shewing deed thereof, for it may be that the deed was delivered to him in remainder upon the livery, and not to the tenant for life. Br. Aid, pl. 34. cites 47 E. 3. 18.

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• Br. Aid, pl. 83. cites S. C. accordingly, that *feme tenant*

2. In *præcipe quod reddat*, the tenant for life prayed aid of him in remainder. Thirne bid him shew deed of remainder, for it belongs to you; and so he did. But Brooke says, Quære if of necessity, for otherwise it is in \* 22 H. 6. 1. For remainder may be by livery without deed. Br. Aid, pl. 56. cites 12 H. 4. 20.

*feme tenant for life received in default of her baron*, prayed aid of him in remainder, and had it without shewing deed. — Br. Monstrans, pl. 56. cites S. C. accordingly. — Br. Counterple del Aid, pl. 11. cites 22 H. 6. 2. S. C. & S. P. accordingly. — Br. Resceipt, pl. 63. cites S. C. — Br. Aid, pl. 87. cites 22 H. 6. 41. that if the grantee of a rent-charge releases to him in reversion, the tenant for life cannot plead this without having the deed, and therefore in avowry upon him in reversion for rent service, the tenant for life who was a stranger to the avowry had aid granted him of the reversioner.

## (W. a) Proceedings, Pleadings, &amp;c.

1. **I**N writ of *cosinage*, the tenant prayed in aid, and after he and the prayee pleaded jointly a last seisin in abatement of the writ, and held good. Thel. Dig. 208. lib. 14. cap. 8. f. 6. cites Mich. 10 E. 3. 527.

But upon demurrer upon the Aid, this is not peremptory. Br. Per-

emptory, pl. 76 cites 13 E. 3. per Seton.

2. If the tenant prays aid, and the demandant counterpleads, and the tenant pleads estoppel against the counterplea, which is adjudged against him, this is peremptory. Per Seton. Br. Peremptory, pl. 76. cites 13 E. 3.

3. In *scire facias* out of a fine after aid prayer, the tenant was received to say that the fine was once executed in the father of the demandant. Thel. Dig. 208. lib. 14. cap. 8. f. 2. cites Hill. 29 E. 3. 21. and Mich. 26 E. 3. 69. and says see 11 H. 4. 68.

4. *Cui in vita*, the tenant said that J. was seised in fee, and leased to him for life saving the reversion, and prayed aid of him, and the demandant said that J. had nothing in reversion. And it was argued, if he should traverse the lease or the reversion, but after gratis they were at issue upon the reversion; nevertheless after it is said elsewhere often, that upon aid prayer the lease shall be traversed, and upon resceipt the reversion. Br. Counterple de Aid, pl. 34. cites 41 E. 3. 8.

5. *Trespass* against J. and 2 others, and the 2 justified because the plaintiff was villein regardant to the manor of B. of J. their master, and

and would not be justified, by which they took him, and the other said that Frank, &c. and so to issue, and the defendant prayed aid of J. their master, and had it, and *venire facias* issued, and *scire facias ad jungendum in auxilium* against J. returnable at one and the same day, and process upon the original against J. returnable the same day, at which day J. came, and joined in aid, and also answered upon the original, and pleaded *villeinage ut supra*; judgment if he shall be answered; and the plaintiff pleaded *frank*, and of *frank estate*, and prayed *venire facias*, and process upon this issue; and the said J. said that she held the said manor in dower, the reversion to J. and prayed aid of him; and per Gascoyne, the last *venire facias* ought not to issue, for one *venire facias* may make an end of all. Contra per Huls, and that both shall issue, and if the one issue be found contrary to the other, he who is warned may have attain; for in replevin against master and servant, the servant justified in name of his master, and after the master joined and avowed for the same cause, the servant is out of court, for in replevin aid shall be granted before issue, and in trespass not, but after issue, and therefore here the servant is not out of court; for if J. will make default, the 2 shall maintain the issue alone, and this aid in trespass is not but *ad manutenendum exitum*, and not *ad respondendum*, and therefore both issues shall be tried; and per Gascoigne, J. shall not have aid of him in reversion because he is party to the writ. Contra per Huls, and that all is one, and see the process upon aid prayer *supra*, that the one issue tried shall not be a conclusion against J. upon the other issue, notwithstanding the aid prayer; quære thereof if it be pleaded, and how the process against the jury, and against the prayee, and against the third as party, shall have one and the same return. Br. Aid, pl. 45. cites 8 H. 4. 17.

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6. It was held that after aid prayer a man shall plead a thing apparent to the writ as *amicus curiæ*. Thel. Dig. 208. lib. 14. cap. 8. s. 4. cites 11 H. 4. 67.

In replevin, after the avowry made the plaintiff had

aid of his feme, and after the aid had, he and his feme were not received to plead matter apparent in abatement of the avowry. Thel. Dig. 208. lib. 14. cap. 8. s. 6. cites Trin. 39 E. 3. 19. but says the contrary was held Mich. 11 H. 4. 28. where it is said also, that the plaintiff and the prayee in aid should plead matter in fact in abatement of the avowry. But that it is held Mich. 34 H. 6. 8. 21. that after the joinder in aid, they shall not plead a thing apparent in abatement of the avowry, but only as *amicus curiæ*.

7. In replevin, the defendant avowed upon a stranger, and the plaintiff said that this stranger leased to him for years, and prayed aid of him, and had it, and they joined, there if they cannot agree in plea, the plea of the termor shall be taken. Br. Joinder in Aid, pl. 11. cites 5 H. 5. 6.

In replevin, the defendant avowed for tenure upon T. a stranger to the re-

plevin, as his very tenant, and the plaintiff said that this T. leased to him for 20 years, and prayed aid of him and had it before issue, whereupon T. joined, and thereupon the defendant confessed the avowry, and the plaintiff pleaded *Ricus arre. ut* as to part, and tender upon the land of the rest, and *Ne unques seisis* for other part, whereupon the defendant demurred, and well; because when aid is granted and the prayor does not agree in plea, there the answer and the plea of the prayee, who is tenant as to the avowry, shall be taken, and the other refused. Br. Joinder in Aid, pl. 2. cites Mich. 2 H. 6. 1. 2.

8. If tenant for life prays aid in *præcipe quod reddat*, and he and the reversioner do not join in plea, there the plea of tenant

for life shall be taken; for he has the franktenement which is the cause of the action, and he in the reversion may falsify the recovery after, if he has cause. Br. Joinder in Aid, pl. 2. cites Mich. 2 H. 6. 1. 2.

9. And in assise the plea of the tenant shall stand, and not the plea of the disseisor to the right of the land. Br. Joinder in Aid, pl. 2. cites Mich. 2 H. 6. 1. 2. and says that 45 E. 3. concordat.

10. Recordare, the defendant made consuance as bailiff of A. B. daughter and heir of T. P. the plaintiff said that A. B. is a bastard, &c. and upon this the defendant prayed aid of A. B. And per Babbington and Cott. he shall have the aid; contra per Strange and Martin; for by him he ought to have prayed the aid in the conclusion of his consuance, and in plea personal a man shall have aid after plea pleaded, and not before, but in plea real a man shall have aid before plea pleaded, and there are only 2 manner of entries of aid, the one is of aid before plea pleaded, viz. that the defendant or tenant petit auxilium de C. sine quo ipse non potest respondere, and after it be after plea pleaded, the entry is Quod defend' petit auxilium de B. ad manutenendum exitum, and in this case it cannot be ad manutenendum exitum; for no issue is joined, and it cannot be, &c. Sine quo non potest respondere; for he has answered to the action, and in the conclusion thereof has not prayed aid, and therefore he has passed the advantage of it, and there are no more entries of the aid but these 2; quære, for it is not adjudged. Br. Aid, pl. 94. cites 4 H. 6. 30.

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11. In trespass against several, one justified by the command of those that had pleaded, and of others not named, because that was the franktenement of them by which he entered, and so to issue, and so prayed aid of all after issue joined. The court held that he should have it of those not named in the writ, but not of those named; whereupon the plaintiff to avoid delay granted the aid of all, and per Cheney the ven. fac. shall issue immediately without attending the coming of the prayee; and process shall issue against the prayee instant; for when he comes he shall not plead any plea, but shall join in aid of the issue, and give evidence; quod nota. Br. Aid, pl. 71. cites 7 H. 6. 71. [21.]

Br. Aid, pl.  
75. cites  
S.C. accord-  
ingly.

12. In præcipe quod reddat the tenant prayed aid of A. who is ready to join, and the tenant demurred [averred] that he is not the same person, and the other e. contra. The tenant prayed process against the prayee, and said that the issue is not receivable, whereupon the tenant was awarded to answer alone in as much as he refused the averment; and so see that issue may be taken, whether he be the same person. Br. Joinder in Aid, pl. 13. cites 7 H. 6. 45.

13. After aid prayed of a parcener, the tenant shall not plead parcenary with one not named in abatement of the writ. Thel. Dig. 208. lib. 14. cap. 8. f. 5. cites Pasch. 9 H. 6. 5.

14. In præcipe quod reddat the tenant prayed aid of one B. his cousin, by reason of partition made between them, and prayed that he be summoned in diverse counties, and in the county of Chester, and the plaintiff said that B. had assets to be summoned in the county of D. and prayed

~~prayed process thereof~~; and by the opinion of the court, except Paston, though the demandant sued the process for his own haste, it shall be intended the process of the tenant, and it is reason that the tenant have his own process where he prays it; quære. Br. Aid, pl. 98. cites 14 H. 6. 3.

15. In annuity against a parson, who shewed cause of aid, and prayed aid of the patron, the cause is not traversable. Br. Coun-terple de Aid, pl. 12. cites 22 H. 6. 47.

But in plea of land, where tenant for life prays aid of

him in reversion, he shall shew cause, and there the cause is traversable. Ibid.

16. In replevin the avowry was on a stranger, of whom the plaintiff prayed aid, and had it; there, upon the joinder, they may plead *Ne unques seisie*, and the like against the defendant; though the termor himself, without the joinder, cannot have such pleas. Br. Joinder in Aid, pl. 15. cites 22 H. 6. 3.

17. In avowry the plaintiff prayed aid of his lessor for years, and had summons ad auxiliandum returned served, at which day the prayee came not, and the plaintiff is *essoigned*. There judgment shall not be given immediately that the plaintiff answer alone, but the default of the prayee shall be recorded; and at the day which the plaintiff has by the *essoign*, the judgment shall be given that the plaintiff answer alone. Quod nota; for his appearance at the day of *essoign* shall not serve, if he does not appear now at this day of the return of the summons, &c. Br. Aid, pl. 1. cites 27 H. 6. 4.

18. Note per Brown, prothonotary, that if the defendant in trespass prays in aid of his master or lessor, who is a stranger to the writ, the plaintiff may say that the prayor is dead, and the other may say that alive, &c. and issue shall be thereof taken. Br. Aid, pl. 144. cites 32 H. 6. 34.

19. Prayee cannot plead in abatement of the avowry admitted by the plaintiff, unless as *amicus curiæ*. Quod nota. Per curiam. Br. Avowry, pl. 12. cites 34 H. 6. 8. 21.

Ibid. pl. 14. cites S. C.

20. In annuity it was said that if a parson prays aid of the patron and ordinary, and they are *essoigned*, or make default, the defendant may relinquish his aid-prayer, and answer alone. Br. Aid, pl. 124. cites 4 E. 4. 28.

So if the patron and ordinary will not join, [257]

there the defendant shall plead alone. Ibid.—But if they will join with the defendant, and plead the *same* plea that the defendant pleads, then they shall be suffered to join with the defendant therein. Ibid.—But if they vary in plea, the plea of the defendant only shall be taken. Ibid.—And though they offer to join, yet the defendant may relinquish the aid-prayer, and confess the action; per Danby Ch. J. Ibid.

21. In annuity after aid-prayer, and before appearance, he who prays in aid may refuse the aid, and plead in bar only; but contra after the prayee appears and offers to join, unless they vary in plea; for then the plea of the tenant shall be taken; but the defendant may confess the action, notwithstanding the prayee offers to join, and if the prayee be *essoigned*, this is no appearance; and note that the defendant may answer alone. Br. Joinder in Aid, pl. 19. cites 4 E. 4. 28.

22. In writ of right by W. against F. who said that he held for life, the remainder to B. and C. who joined by process, and prayed that

that the *demandant* count against them, and it was said that he *shall not count*, but shall have *oyer of the first writ and count*, and so he had, and vouched. Br. Aid, pl. 132: cites 11 E. 4. 2.

23. If aid be *granted where it does not lie*, it is *not error*, but *delay*. *Contra* if aid be *denied where it does lie*, it is *error*; per Fineux. Br. Aid, pl. 118. cites 8 H. 7. 8.

For more of Aid of a Common Person in General, see Aid of the King, Warceners, Rescript (S) Voucher, and other proper titles.

## Alien.

Fol. 194, (A) Alien-born. Alien-Friend, What things he may have, without Forfeiture to the King.

• Br. Denizen, &c. pl. 17. cites S. C. [ 1. **A**N alien may *purchase* land, \* 11 H. 4. 26. b. † 14 Hen. 4. 20. Co. Litt. 2. b.]  
† Br. Denizen, &c. pl. 2. cites S. C.

• Br. Denizen, pl. 17. cites S. C. [ 2. *But the king may seise it.* \* 11 Hen. 4. 26. b. † 14 Hen. 4. 20.]

& S. P. But the purchase *ought to be found by office*. And so it was in the case of ALAN KING, in the time of king E. 6. *Quære* if information in the *exchequer* shall not serve in this case. It seems that it shall not.—Br. N. C. pl. 443. temp. E. 6.—The king, upon office found, shall have them. Co. Litt. 2. b.

† S. P. if without licence. Br. Denizen, pl. 2. cites 14 H. 4. 19. S. C.

Though he cannot purchase freehold, yet he [ 258 ] [ 3. If an alien friend be a *merchant*, he may *purchase a lease* for *years of a house for his habitation*, and the king shall not have this so long as he inhabits there. Co. Litt. 2. b. For this was necessary for his trade and traffick.]

may have a house of habitation here for the time that he is here, though he be no denizen, but is to remain here for merchandize, or the like; per cur. obiter. Poph. 36.—S. P. admitted; for if they were disabled in such case, it were in effect to deny them trade and traffick, which is the life of every island. 7 Rep. 17. a. in Calvin's case.—See D. 2. b. Marg. pl. 8. Yaborow's reading upon the statute of 27 E. 3. cap. 2. accordingly.

S. P. unless he leaves servants residing there during the time. D. 2. b. Marg. pl. 8. in Yaborow's Reading in Lent, 35 Eliz. on the stat. 27 E. 3. cap. 2. [ 4. *But if he departs or leaves the realm*, the king shall have this lease. Co. Litt. 2. b.]



[5. *So if he dies possessed thereof, yet his executors or administrators shall not have it.* Co. Litt. 2. b. Sir James Croft's case, 29 Eliz.]

[6. *But such alien friend, though he be a merchant, yet if he purchases a lease for years of land, meadow, &c. the king shall have it; for this is not necessary for his trade or traffick.* Co. Litt. 2. b. Sir James Croft's Case. 29 Eliz. Resolved.]

It was said 5 M. 1. in parliament, that if an alien born obtains a

*lease for years, the king shall have it; for he cannot have land in this realm of any estate.* Br. Denizen, pl. 22. cites 5 M. — Br. N. C. pl. 491. S. C. — No alien can have land within the realm, unless he be denizen. D. 2. b. pl. 8. Pasch. 19 H. 8. — And. 25. pl. 56. The opinion of the justices of C. B. was, that alien friend may have goods and leases in England, and may make testament of them, though he be not denizen. — Bendl. 36. pl. 61. S. C. accordingly. — S. P. 7 Rep. 17. a. in Calvin's case,

[7. *But if an alien friend, who is not any merchant, purchases a lease for years of a house for his habitation, yet the king shall have it.* Co. Litt. 2. b. Sir James Croft's case. Resolved.]

See pl. 24.

[8. *If an alien friend purchases a copyhold in fee in the name of J. S. in trust for himself and his heirs, quære whether the king shall have this trust of the copyhold.* Pasch. 24 Car. B. R. this was a question between the King and Holland, and much argued at bar, but no opinion given therein; but the trust being traversed, and this found for the king, yet judgment was given against the king, because by the inquisition by which this trust and matter was found, J. S. who was the person trusted, and who had the estate in fee in him, was put out of possession thereof by the inquisition; whereas the alien had but the trust, and no possession, and therefore admitting the trust was given to the king, yet the king could not have the possession by force thereof, but ought to sue to have the trust executed in a court of equity. Intratur Trin. 21 Car. Rot. 20.]

\* All. 14. S. C. and Roll said, that though the king should have the use, he could not seise the land itself by law, but by equity might have a decree for it, and so was Sir John Dack's case. —

Stry. 20. 41.

76. 84. 90. 94. S. C. Curia advisare vult. — Mod. 17. pl. 46. Arg. cites Styles's Reports S. C. that if an alien purchase copyhold lands, the king shall not have the estate but as a trust, and that the particular reason was, because the king shall not be tenant to the lord of the manor. But see Stry. 40. &c. cited as above. — D. 2. b. Marg. pl. 8. says, that Harrison in his reading at Lincoln's Inn, 1632. held, that an alien cannot purchase copyhold land, because he has no capacity to retain but only for the king, and the king cannot hold of any, and therefore if he purchases it ought to escheat to the lord of the manor.

9. Pasch. 11 E. 3. Rot. 87. *Land was extended upon a statute acknowledged to an alien friend merchant, and delivered to him, and office was found for the king, and adjudged that he shall have the land upon the extent, and shall not be taken from him upon office found, and that this is within the stat. 13 E. 1. de mercatoribus, and if he be ousted he shall have an assise, and so Glanvill J. inclined in his reading, and the case above was debated three years.* Hill. 13 E. 3. accordingly. D. 2. b. Marg. pl. 8.

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10. *If a reversion of land be granted to an alien by deed, and before attornment the alien is made denizen, and then the attornment is made, the king upon office found shall have the land; for as to an estate between the parties it passes by deed ab initio.* Co. Litt. 310. b.

11. *An alien is not capable of an office.* Jenk. 130. pl. 64. cites 4 E. 4. 9.

12. By

12. By the common law an alien was capable of a *benefice* in England; for the church is one throughout the whole world; but at this day it cannot be without the king's licence, by the statutes made 25 E. 3. and 10 R. 2. Jenk. 130. pl. 64.

D. 283. b.

pl. 31.

Pach.

11 Eliz.

S. C. and it was that

13. An alien and an Englishman were joint purchasers; the alien died; the survivor shall not have the whole, but upon office found the queen shall have the moiety. Le. 47. in pl. 61. Fenner cited it as adjudged in Forcet's case.

T. K. infeoffed B. an alien, and Forcet, to the use of himself and his wife in tail, remainder to his right heirs, and it seemed, that if an office be found, the queen should have the moiety by her prerogative to her own use, and the other use in this moiety is gone for ever.—Goldsb. 29. pl. 4. Mich. 28 & 29 Eliz. Fenner said that he had heard lately in the Exchequer, that an alien and an Englishman purchased lands jointly, and the alien dying, it was adjudged that the other should have the whole by survivorship. But Anderson and the whole court said, that this could not be law; for it is a maxim, that nullum tempus occurrit regi.—If one covenants to stand seized to the use of his brother, being an alien, the same is good, and an use will arise; per cur. Goldb. 275. in pl. 388. Hill. 16 Jac. B. R.

But see

dower (A)

pl. 2. (B)

pl. 1. and

(C) pl. 1.

where such marriage

was by the king's licence, that she had dower.

14. If one takes an alien to wife, and then he aliens his land, and afterwards she is made denizen, and the husband dies, she shall not be endowed, because her capacity and possibility to be endowed came by the denization, but otherwise it is if she were naturalized by act of parliament. Co. Litt. 33. a.

15. Lease for years was made to an alien on condition to have fee on paying 20l. During the lease he is made denizen, and after pays the 20l. Frowike in his Reading, as cited by Dyer, held that the king should have the fee, but Plowden thinks the alien, being then a denizen at the time of payment, shall have it. Pl. C. 482. b. Mich. 17 & 18 Eliz. in case of Nicholls v. Nicholls.

Jenk. 3. pl.

2. S. P. viz.

both on the

part of the

father and

of the mother.

16. *Duplicatus sanguis* if not necessary in descents or purchases; as alien has issue a son by a wife inheritrix, which son is born in England, this son, after the death of the wife, shall inherit the land. Jenk. 203. pl. 27.

Le. 47. pl.

61. S. C.

but no

judgment—

4 Le. 82.

pl. 175.

S. C. in

totidem

verbis.

17. An alien born purchased lands, and before office found the queen made him denizen and confirmed his estate. Anderson Ch. J. thought the lands were not in the queen before office, and so the confirmation good; but Rhodes held that he should take only to the use of the queen, and then the confirmation void. And afterwards Shuttleworth being asked as to his opinion by divers barristers, declared, that he thought it not in the queen before office, and therefore thought the confirmation good. Quære. Goldsb. 29. pl. 4. Mich. 28 & 29 Eliz. Anon.

Goldsb. 102.

pl. 7. S. C.

and Ander-

son J. held

him a good

tenant to the

præcipe be-

18. A. an alien had lands by purchase in tail, the remainder to B. in fee. A. suffered a common recovery, and died without issue. This being found by office, the whole court held that the recovery was good, and should bind the remainder. 4 Le. 84. pl. 177. Mich. 30 Eliz. C. B. Anon.

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fore office found, and that the office has relation for the possession of the alien, but not to say that the alien never had it, and the justices held it a strong case that the queen shall have it, and that the remainder is gone.—10 Mod. 124. Arg. S. P. accordingly, that he is a good tenant to the præcipe before office found.

19. An alien may have *administration of leases* as well as of personal things, because he has them in another's right, and not to his own use. Resolved per tot. cur. Cro. C. 9. pl. 6. Pasch. 1 Car. 1. S. C. cited Vent. 417. by Hale Ch. J. C. B. Carvon's case.

20. The law will not give an alien the benefit of taking by an act in law; as by *descent, curtesy, dower, or guardianship*, because he cannot keep it; and *lex nihil facit frustra*. Per Hale Ch. Baron. Vent. 417. in the case of COLLINGWOOD v. PACE. 7 Rep. 25. a. in Calvin's case, S. P. and instances as to dower

and curtesy.—Co. Litt. 31. a. S. P. accordingly as to dower.

21. If an agreement for a house is made with an alien artificer for so long as he and I please, at the rate of 20l. per ann. assumpsit will lie thereon, and so the statute is evaded; so if it be that he shall have my house for so long as he and I please, for so much as it is worth. Per. cur. And yet agreed that a contract which amounts to a lease is void by this statute. 2 Show. 135. pl. 114. Mich. 32 Car. 2. B. R. in case of Pilkington v. Peach.

22. An alien cannot purchase land for his own benefit, but he may for the benefit of the crown. See 10 Mod. 91. 94. 120. 122. Arg.

23. Marriage is not a gift in law of a term for years to an alien, for his wife may sue and be sued as a feme sole. Admitted. Arg. 9. Mod. 104. Mich. 11 Geo. in case of Theobald v. Duffoy.

24. 32 H. 8. cap. 16. s. 13. Enacts, that leases of houses or shops to strangers artificers, who are not made denizens, shall be void, and that the lessor and lessee shall forfeit 5l. to be divided between the king and the prosecutor. A lease was made of a house and a bond given for performance

of covenants. In debt brought upon the bond the defendant pleaded this statute, and that it was a lease for years made to an alien artificer. It was admitted that the lease was void, and therefore per cur. the obligation is void also; for it would be absurd that when the statute makes the lease void and so destroys the contract, the obligation to enforce the payment of the rent should remain good. And it was said that though such lease be made to an alien artificer by the name of gent. yet if in truth he be an artificer, such lease shall be void by this statute; and judgment for the defendant. Sid. 308. pl. 19. Mich. 18 Car. 2. B. R. Jevons v. Harridge. —Saund. 7. S. C. says exception was taken to the plea, that the defendants had not averred that the messuage demised was a mansion-house, and that the statute intended only to provide that alien artificers should not have house or shop to exercise their trades publickly in prejudice of natural subjects exercising the same trades, but if they would live here as gentlemen upon their estates, they might take leases of stables, coach-houses, or other convenient houses to lodge their necessary goods in, and such are not within the words nor meaning of this act, because not within the mischief of it; and therefore the plea was ill for uncertainty; and of such opinion were Twissden and Windham J. But Kelynge held that the messuage shall be intended a mansion-house prima facie, and that the plaintiff ought to reply that it was not a mansion-house, and so the point would come in question. Moreton J. hesitated. And afterwards the defendants thinking the judgment of the court would be against them, they paid the plaintiff the rent and charges as the Reporter (who was counsel for the plaintiff) said he was told by the plaintiff's attorney; and that so no judgment was given.

—S. C. cited as adjudged, that the bond for performance of covenants was void, and agreed by all the court and counsel at the bar to be good law. 2 Show. 135, 136. Mich. 32 Car. 2. —In debt brought on such bond, the defendant pleaded this statute, and sets forth that he is a vintner, and an alien artificer. The Ch. Justice said that this statute refers to 1 R. 2. cap. 9. which prohibits alien artificers to exercise any handicraft in England, unless as servant to a subject skilful in the same art, upon pain to forfeit his goods; so that it is plain that such as used any art or manual occupation were restrained from using it here to the prejudice of the king's subjects; that the mystery of a vintner chiefly consists in mingling wines, which is not properly an art but a cheat; and so the plaintiff had his judgment. 3 Mod. 94. Hill. 1 Jac. 2. B. R. Bridgham v. Frontee.

At common law, a lease to an alien artificer, either of an house or shop, was good between the parties,

*ies, but forfeitable to the king; but now if a shop is let to an alien artificer, the lease is void by the statute 32 H. 8. and if the lessor brings an action of debt for rent, the lessee may plead this statute in bar to the action; but if an house or shop is let to an alien gentleman, the lease is not void within that statute, neither is it pleadable in bar to an action. 3 Salk. 29. Anon.*

## (A. 2) Who is Alien, and who Alien Friend or Alien Enemy.

1. **H**E who is *born beyond sea before the statute*, whose father and mother were *English*, was inheritable by the common law, nevertheless now this is clear by the statute; per Hussey. Br. Discent, pl. 47. cites H. 10 H. 4. 9.

Thel. Dig.  
lib. 1. cap. 6.  
pl. 16. cites  
S. C.

2. If a *man goes over sea without the king's leave*, and has issue there and dies, and the issue survives, the *issue* shall not be his heir inasmuch as he is *alien born*, and the land shall escheat, and no other shall be his heir; per Newton. Br. Denizen, pl. 14. cites 22 H. 6. 38.

3. *But contra Lib. Dr. & St. and that where the eldest son is an alien, and the youngest denizen*, there the youngest shall be heir, as between bastard and mulier; but e contra where the eldest lawful son is attainted in the life of his father of felony, for he was once able. Contra of bastard and alien, nota differentiam. Ibid.

4. If the king grants patent of denizen to *W. N. born at B. under the dominion of the emperor, where he was born in France*, this grant is void by the false surmise; per Brian, but per cur. contra, and that this cannot be tried, and the effect is that he is made denizen. Br. Denizen, pl. 23. cites 9 E. 4. 11. Bagot's case.

5. If all the people of England would make war with the king of Denmark, and the king will not consent to it, this is not war; but where the *peace is broke by ambassador*, the league is broke. Br. Denizen, pl. 20. cites 19 E. 4. 6.

6. An *Englishman passed the sea and married a female alien*, by this the feme is of the leageance of the king, and her issue shall inherit. Br. Denizen, pl. 21. cites the printed book of Abridgment of Assises.

7. He who was *born beyond sea, and his father and his mother were English*, their issue shall inherit by the common law; per Hussey Ch. J. Thel. Dig. 4. lib. 1. cap. 6. f. 9. cites 1 R. 3. 4.

8. Thel. Dig. 4. lib. 1. cap. 6. f. 13. Says, that the opinion of Sir Edward Saunders, Ch. Baron, in the case of Stowel, Pl. C. fol. 368. b. is that *those who are in Ireland or Scotland, are extra regnum Angliæ*, and so within the exception of *extra regnum* in the statute of fines.

9. 14 & 15 H. 8. 4. *Englishmen swearing allegiance to foreign princes shall pay the same duties as aliens, but upon their returning and dwelling in the realm, to be restored to their privileges.*

10. The son of an alien whose son is born in England is an Englishman, and not an alien. Br. Denizen, pl. 9. cites 36 H. 8.

11. *A bastard was begot at Tournay by an Englishman of an Englishwoman after the conquest thereof by H. 8. and Catline Ch. J. Saunders Ch. B. Whiddon and Brown J. and Dyer, held that this bastard was a liege-man, in like manner as issue born here in England' between aliens, and so capable of purchasing and impleading here as a denizen, Tournay being at the time parcel of the dominions of England. D. 224. pl. 29. Trin. 5 Eliz. Anon.*

S. C. cited 7 Rep. 22. b. — Jenk. 227. pl. 91. cites S. C. & S. P. accordingly; and says, that he continues so al-

though Tournay be won back by the French; for he was born in obedientia & ligeantia regis Angliæ. By the two chief justices and other judges. Jenk. 227. pl. 91.

The law is the same although the mother be French, or the *father and mother French*: for the reason is alike. Jenk. 227. pl. 91. — S. C. and S. P. cited by Vaughan Ch. J. Vaugh. 282. For it was part of the dominions belonging to the king of England pro tempore.

Such also is the law, if an *husband and wife who are aliens have issue born in England, where the parents are born in France.* Jenk. 227. pl. 91.

12. *Persons born upon the English seas are not aliens. Molloy [ 262 ] 370.*

13. If an alien comes into England, and has issue two sons, those 2 sons are indigenæ, subjects born, because born within the realm. Co. Lit. 8. a.

14. Alien signifies one born in a strange country, under the obedience of a strange prince or country. Co. Litt. 128. b. 129. a.

15. If baron and feme go beyond sea without licence, or tarry there after the time limited by the licence, and have issue, this issue is alien, and not inheritable. Held upon evidence in ejectment, contrary to the opinion of Hussey, 1 R. 3. 4. Cro. E. 3. pl. 8. Hill. 24 Eliz. B. R. Hyde v. Hill.

4 Le. 110. pl. 223. 19 Eliz. S. C. that by staying there longer than the appointed

time, they lose the benefit of subjects. — But it being further proved that the baron, who was attainted of treason, and went beyond sea without licence, returned in the time of Queen Mary, and was restored by act of parliament, it was thereupon held that the issue was inheritable.

16. A's father and mother enseint dwelt in Calais when it was took by the French, and fled into Flanders, and there the wife was delivered. Adjudged he shall be denizen, because the parents were born in Calais, and he was begotten there, though born in Flanders. D. 224. pl. 29. Marg. cites 2 Jac. in the Exchequer, Colt's case.

17. A postnatus in Scotland brought an assise of lands in Middlesex. The defendant pleaded to his person, that he was an alien born in Scotland, after the death of Queen Elizabeth, sub ligeantia Regis Scotiæ. Upon a demurrer, and after several adjournments, it was resolved for the plaintiff by all the judges of England. Jenk. 306. pl. 82. Calvin's case.

7 Rep. 1. Trin. 6 Jac. S. C.

18. There are regularly (unless in special cases) 3 incidents to a subject born. 1. \* That the parents be under the actual obedience of the king. 2dly, † That the place of his birth be within the king's dominions. 3dly, ‡ The time of his birth is chiefly to be considered; for he cannot be a subject born of one kingdom, that was born under the legiance of the king of another kingdom; albeit afterwards the one kingdom descends to the king of the other kingdom. 7 Rep. 18. a. Trin. 6 Jac. in Calvin's case.

If enemies should come into any of the king's dominions, and surprise any castle or fort, and possess the same by hostility, and

have issue there, such issue is no subject to the king, though he be born within his dominions, because he was not born under the king's ligeance or obedience. 7 Rep. 18. a. b. in Calvin's case. — Ibid. 6. a. S. P. and also because such issue was not born under the king's protection.

† And



And therefore all persons born in Normandy, Gascoign, Guyen, Anjou, and Bretagne, while they were under the actual obedience of the king of England, were inheritable within this realm as well as Englishmen, because they were under one ligeance due to one sovereign; and therefore persons born in the isles of Guernsey and Jersey, parcel of the dukedom of Normandy, though no parcel of the realm of England, but several dominions enjoyed by several titles, and governed by several laws, are inheritable to lands within the kingdom of England. 7 Rep. 20. b. 21. a.—But persons born in other parts of Normandy, &c. now out of the actual possession of the kings of England, are not, for that reason, subjects of the kings of England. 7 Rep. 18. a.

And therefore the *Antenati* in Scotland were aliens born. 7 Rep. 18. b. in Calvin's case.—And the uniting the kingdoms by descent subsequent cannot make him a subject to that crown, to which he was an alien at the time of his birth; but if the kingdoms should by descent be divided and governed by several kings, yet all those born under one natural obedience, while the realms were united, will not be aliens; for naturalization vested by birth-right, cannot by a separation of the crowns afterwards be taken away; nor can he that was by judgment of law a natural subject at the time of his birth, become an alien by such a matter, *Ex post facto*. 7 Rep. 27. a. b.—S. P. & S. C. cited by Vaughan Ch. J. Vaugh. 286. 287. in case of *Craw v. Ramsey*.

19. An alien is a subject that is born out of the allegiance of the king, and under the ligeance of another. 7 Rep. 16. in Calvin's case.

Secus if the wife be a  
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foreigner.  
Jenk. 3. pl. 2.

20. If ambassador in a foreign country has issue there by his wife, an Englishwoman, by the common law they are natural-born subjects, and yet they are born out of the king's dominions. 7 Rep. 18. a. in Calvin's case.

Mar. 91. pl. 150. S. C. resolved accordingly. —Jenk. 3. pl. 2. cites S. C. accordingly; for the vocation of a merchant requires a long commorance abroad, if he will not trust his fortune wholly to factors.—

21. A merchant trading in Poland married an alien, and died, leaving her big with child. It was held that the father, being an English merchant, and living abroad for merchandize, the after-born child is born a denizen, and shall be heir to him; for as Berkley J. said, she is sub potestate viri & quasi under the allegiance of our king. And per Brampton, though the civil law is that *partus sequitur ventrem*, yet our law is otherwise, and the child shall be of the father's condition, and he being an English merchant, and residing there for merchandize, his children shall by the common law, or rather, as Berkley said, by the statute 25 E. 3. be accounted the king's lieges, as their father was. And another case being cited to have been adjudged 2 Car. accordingly, judgment was given for the plaintiff, the after-born child. Cro. C. 601. pl. 5: Hill. 16 Car. B. R. *Bacon v. Bacon*.

Sid 198. cites S. C.—S. C. cited by Hale Ch. Baron in his argument, as adjudged by all the justices of England.

So where such merchant had several children born in Poland of a Polish woman, and devised his lands in England to such children; and it being demanded of all the justices of England at Serjeant's-inn, as Yelverton J. said, they made no scruple any of them but that the issue should inherit, and were not aliens, because the father went with licence, being a merchant, and in our law *partus sequitur patrem*; and also there is blood between him and his issue, and he communicates nature to them; and the judges said that this issue have *Fidem utriusque regis*, both of England and Poland. And several of the judges took it, that the words of 25 E. 3. *De natis ultra mare, ubi sunt patres et matres le, or shall be of the allegiance of the king*, shall be taken distributive & non copulative, fathers or mothers. But the reporter adds a nota, that no such opinion was delivered by some of the justices as mentioned by Yelverton J. Litt. Rep. 28. 29.



(A. 3) How far privileged, restrained, or enabled.

1. **A**N alien born *shall not be a juror in a jury*; for he is out of the allegiance of the king, and is not liege of the king. Quod nota. Br. Denizen, pl. 2. cites 14 H. 4. 19.
2. If alien enemy *invades* this realm, and is taken, he shall not be put to death, but *ransomed* jure belli. Jenk. 216. pl. 58. says 13 E. 4. 9. accords as to this.
3. If an alien, *whose king is in amity with our king, joins with rebels*, he shall be put to death as a *traytor*. Jenk. 216. pl. 58.
4. How far an alien may be capable of being guilty of *high treason*, see Hawk. Pl. C. cap. 17. l. 5. 6. 7.
5. *May freely import fish, or other victual*. See Hawk. Pl. C. cap. 80. l. 7.
6. May have the benefit of *clergy*. 2 Hawk. Pl. C. cap. 33. l. 5.
7. Note, by all the justices, if a *merchant stranger* who is of the amity of the king be robbed by one who is of obedience of the king, or who is of the amity, he shall have *restitution*. Br. Denizen, pl. 8. cites 2 R. 3. 2.
8. *But if the party was not of the amity of the king at the time, &c. or if the robber was not under the obedience of the king at the time, &c. or in amity of the king*, he shall not have restitution, for then *quisque capere potest, quod capere potest*. Ibid.
9. If alien amies living here under the king's protection commit treason, the indictment shall conclude, that it was done *contra debitam allegiantiam*, and shall call the king *dominum suum*, but not *naturalem dominum*; per Hobart Ch. J. Hob. 270. pl. 356. Mich. 17 Jac. in the Star-chamber, in Courteen's case.
10. A Frenchman brings goods into England *before war proclaimed* between the two nations, neither his person or his goods may be *seized*; but if it was *after war proclaimed*, both his person and goods may be seized, and the same law it is if he be drove in by tempest; per omnes J. Angliæ. Jenk. 201. pl. 22.
11. An action upon the *case* was brought by an *executor for work done*, &c. by his testator an alien; if the action attached in him before the breaking out of any war between the 2 nations, and so he died before he became an alien enemy, he might have an executor, and the action though brought by his son who is executor, though an alien, *en auter droit*, shall be maintained. Skin. 370. pl. 18. Mich. 5 W. & Main B. R. villa v. Dimock.
12. If an alien *enemy* come into England without the queen's protection, he shall be seized and imprisoned by the law of England, and he shall have no advantage of the law of England, nor for any wrong done to him here. 7 Mod. 150. Hill. 1 Ann. B. R. Sylvester's case.

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## (B) Alien. Enemy.

Br. Deni- [ 1. ] **I**F a man be bound to an alien enemy, this is void quoad the  
zen, pl. obligee. 19 E. 4. 6. a. b.]  
16. cites

S. C. and ibid. pl. 20. cites S. C. per Brian.—Br. Barre, pl. 84. cites S. C. that by some the obligation is void.—Br. Obligation, pl. 54. cites S. C.—Br. Dette, pl. 219. cites S. C.

Br. Deni- [ 2. So if a man be bound to an alien friend, who after becomes  
zen, pl. 16. an enemy, it is void quoad him. 19 E. 4. 6. a. b.]  
cites S. C.—

Brian said, that perhaps the king shall have it, S. P. Br. Denizen, pl. 20. cites S. C. and note, that in debt upon the obligation the defendant said that the plaintiff was alien born at D. in Denmark, under the obedience of the king of Denmark, the king's enemy, and all his lieges are the king's enemies a long time, viz. anno 8. of the now king; and so it seems, that if he had been alien who had not been enemy to the king, that then he shall not be disabled, because he is alien; and per Brian, the defendant ought to shew how the league is broke; for if all England would make war with the king of Denmark, and the king will not consent to it, it is not war, but where the peace is broke by ambassador the league is broke.

Br. Deni- [ 3. But in both cases the king shall have it. 19 E. 4. 6. a. b.  
zen, pl. 16. but quære.]  
cites S. C.

But Brooke says, that the case of debt [as to alien friend] is denied at this day, and never was law, for the alien shall have it, and shall sue before the council at least. But quære thereof; for by several he shall sue at common law in action personal, and alien born is no plea.—Br. Denizen, pl. 20. cites S. C. which see in the Notes at pl. 2.—Br. Barre, pl. 84. cites S. C. & S. P. as to alien enemy.—Br. Obligation, pl. 54. cites S. C. & S. P. as to alien enemy.—Br. Dette, pl. 219. cites S. C.

Jenk. 207. 4. If a Frenchman inhabits in England, and afterward war is  
pl. 22. S. P. proclaimed between England and France, none can take his goods,  
and cites because he was here before. Br. Property, pl. 38. cites 7 E.  
S. C. 4. 14.

Jenk. 207. 5. But if a Frenchman comes here after the war proclaimed, he  
pl. 22. S. P. it by his good will, or by tempest, or if he yields and renders  
and cites himself, or stands in his defence, every one may arrest him and  
S. C. take his goods, and by this he has property in them, and the king  
shall not have them, and so it was put in ure the same year be-  
tween the English and Scots, and the king himself bought divers  
[ 265 ] prisoners and goods the same year as Bologne was conquered, of  
his own subjects; Quod nota bene. Br. Property, pl. 38. cites  
7 E. 4. 14. and 36 H. 8.

6. Where an alien ought to have amerciament the king shall have it, if it appears in the rolls of the court, and this is of amerciament for suit of court, &c. Br. Denizen, pl. 16. cites Fitzh. Avowry 223.

(C) Alien.

(C) Alien. Denizen. What Act in Law will make a Man a Denizen.

[1.] If an alien friend comes into England when he is an infant, and always after for a long time continues here, and is sworn to the king, yet he continues an alien. 14 H. 4. 20.]

S. P. though he abides long here and is sworn in leets; for

he cannot be denizen but by grant of the king. Br. Denizen, pl. 11. cites 14 H. 4. 19. and 14 E. 3. accordingly.—And his having been sworn in leets and juries does not make him a liege-man of the king. Nota. Br. Challenge, pl. 48. cites S. C.—Fitzh. Challenge, pl. 91. cites 14 H. 4. 19. S. C. and S. P. so that he cannot be a juror, and if he purchase land it shall be seised into the king's hands.—Fitzh. Denizen, pl. 3. cites S. C.

2. A. devised an house to his wife for life, remainder to B. (who was an alien) if he should be then a denizen, and capable to take, if not, then to the heirs of his body, and in default of such issue, remainder to the master and governors of the free-school of St. Olives. After the death of the wife, B. entered, and enjoyed the same many years, and sold the same to C. The master and wardens brought an ejectment, supposing that B. was an alien, and died without issue; but to prove that he was a denizen, it was shewed that in the deed and fine he called himself a freeman, and that the fine was with proclamations, and 5 years passed. And that as aliens are prohibited by statute from being of any trade, upon pain of forfeiture of their goods, he would not have incurred the penalty by using a trade here without being first made a denizen. But per Williams J. a denizen cannot be made but by letters patents, or act of parliament, which cannot be sufficiently proved without matter of record. The court were all clear of opinion, that the plaintiff had good title, but the parties agreed, and no verdict given, but a juror withdrawn. 2 Bulst. 33. Mich. 10 Jac. The Free-School of St. Olave's case.

(C. 2) Denizen. Who. And How considered and favoured.

1. If a man be born beyond sea, whose father and mother are English, such was inheritable before the statute, but now the statute makes it clear; per Hussey Ch. J. Br. Denizen, pl. 6. cites 1 R. 3. 4.

2. If alien born has issue a son beyond sea, and after is denizen here, and purchases land, and has issue another son, and dies, the youngest son shall inherit the land; for the eldest is alien born. Br. Denizen, pl. 7. cites 1st Book of Dr. & St.

S. P. Br. Denizen, pl. 19.

3. And the eldest son is not heir, because he is alien; but this is not corruption of blood, as where the eldest son is attainted in the life of the ancestor, there the land shall escheat. Br. Denizen, pl. 7. cites Doct. & Stud. 1. lib.

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Br. Deni-  
zen, &c. pl.  
19.

4. *But of land purchased before he was denizen, none shall inherit it; for the king shall have it. Quod nota bene. Ibid.*

\* See Trial,  
(G. a. 2)—  
S. C. & S. P.  
cited and  
approved by  
Vaughan  
Ch. J. Vaugh. 291.

5. It appears by the statute \* 28 E. 3. cap. 13. that denizens *are as well those who are English born as those who were aliens, and are made denizens by the king by his letters patents.* Br. Denizen, pl. 4. cites 21 H. 7. 32.

6. *But see the statute, that denizens shall pay customs as aliens, is not so construed nor intended, but is intended of those who were made denizens by the king, and who were aliens before. Ibid.*

7. If an alien is made denizen, and purchases lands, and dies without issue, the lord of the fee shall have the *escheat*, and not the king. Co. Litt. 2. b. cites it as resolved inter alia Pasch. 29 Eliz. in Sir James Crofts's case.

S. C. & S. P.  
cited and  
approved  
by Vaughan  
C. J. Vaugh.  
291.

8. In case of the conquest of a Christian kingdom, as well those that served in the wars at the conquest, as those that remained at home for the safety and peace of the country, and other the king's subjects, as well antenati as postnati, are capable of lands in the kingdom or country conquered, and may maintain any real action, and have the like privileges and benefits there as they may have in England. 7 Rep. 18. a. in Calvin's case.

### (D) Alien. Naturalization.

Br. Deni-  
zen, &c. pl.  
1. cites S. C.  
but S. P.  
does not appear.

[1. **A**N alien born in Portugal, who came into England with Beatrice Countess of Arundel, was naturalized by parliament, and was enabled to purchase, &c. 3 H. 6. 55.]

2. Letters patents of the king shall not enure to two intents; as where *land or assise* is granted to an alien born, this does not make him a denizen. Br. Patents, pl. 62. cites 7 E. 4. 30. per cur.

S. P. as to  
naturaliza-  
tion, Cro. J.  
539. pl. 7.  
in S. C. by  
the Ch. Jus-  
tice; but deniza-  
tion may be pro tempore, as for years, &c.

3. An alien may be made *denizen for life, or in tail*; but *naturalization cannot be either with limitation for life or in tail, or upon condition*; for that is contrary to the absoluteness, purity, and indebility of natural allegiance. Co. Litt. 129. a.

2 Roll. Rep.  
95. S. C. &  
S. P. by  
Mountague  
Ch. J.  
Trin. 17  
Jac. in case of Godfrey v. Dixon.

4. Naturalization is *always by parliament, and perpetual*; for if one be naturalized *for a day it is good for ever*; per Mountague Ch. J. Cro. J. 539. pl. 7. Trin. 17 Jac. in case of Godfrey v. Dixon.

6. Naturalization is an adoption of one to be intitled by birth to what an Englishman may claim; and where naturalization is, it *takes effect from the birth of the party, but denization takes effect from*

from the date of the patent. Arg. Cart. 187. cites Cro. Jac. 539. Godfrey's case.

7. *Naturalizing in Ireland is of no effect as to England; for naturalization is but a fiction of law, and can have effect but upon those only consenting to that fiction, therefore it has the like effect as a man's birth hath, where the law-makers have power, but not where they have not. Naturalizing in Ireland gives the same effect in Ireland as being born there; so in Scotland as being born there; but not in England, which consents not to the fiction of Ireland or Scotland, nor to any but her own. Vaugh. 280. Hill. 21 & 22 Car. 2. C. B. in case of Craw v. Ramfay.*

2 Sid. 23. &  
148. Foster  
v. Ramfey,  
S. C. ad-

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judged.—  
Cart. 185.  
S.C. argued.  
—2 Jo.  
10. Crow  
v. Ramfey,  
S. C. ad-

judged.—2 Vent. 1. S. C. adjudged by 3, contra 1.—But because naturalization in Ireland, which makes a man as born there, shall not make him likewise as born (viz. not to an alien) in England, it is no good inference that therefore one denized in England shall not be so in Ireland, which is a conquered and subjected country; per Vaughan Ch. J. Vaugh. 291. in S. C.

8. 25 E. 3. stat. 2. *De natis ultra mare. The king's children are inheritable in England, wheresoever born.*

*Subjects children (born beyond sea) are also inheritable, so that their parents at the time of their birth were within the king's allegiance, and that the mother went beyond sea with her husband's consent.*

*If bastardy be alleged against any born beyond sea, the certificate shall be made by the bishop of the place where the land demanded lieth.*

9. 7 Jac. cap. 2. *No person of the age of 18 years, or above, shall be naturalized or restored in blood, unless he have received the Lord's Supper within one month before any bill exhibited for that purpose, and also shall take the oath of supremacy and allegiance in the parliament-house before his bill be twice read; and the lord chancellor, if the bill begin in the upper house, and the speaker of the commons house, if the bill begin there, shall have authority during the sessions to minister such oaths.*

10. 11. & 12 W. 3. cap. 6. *All persons, being the king's natural-born subjects, may inherit as heirs, and make their titles by descent from any of their ancestors lineal or collateral, although the father and mother, or other ancestor of such persons, through whom they derive their title, be born out of the king's allegiance.*

11. 7 Ann. cap. 5. *No person shall be naturalized by this act, unless he hath received the sacrament in some Protestant congregation in Great Britain, within 3 months before the taking the oaths appointed by 6th of Q. Ann.; and at the time and place of taking them must produce a certificate signed by the parson who administered the sacrament, attested by two credible witnesses, which must be entered of record in the court.*

*Children of natural-born subjects, born out of the queen's ligeance, shall be deemed natural-born subjects.*

*Foreign Protestants, taking and subscribing the oaths and the declaration appointed by the act made in the 6th of Q. Anne, touching electing 16 peers of Scotland, &c. are naturalized.*

12. 10 Ann. cap. 5. *The said statute of 7 Ann. 5. is repealed,*  
U 3 (except

(except so much by which the children of natural-born subjects, born out of the allegiance of the queen or her successors, are to be adjudged and taken to be natural-born subjects of this kingdom) and that this repeal shall not prejudice the naturalization of any persons who have been or shall be naturalized before the 4th of February 1711.

13. 1 Geo. 1. cap. 4. s. 1. The clause in the act 12 W. 3. cap. 2, whereby it is enacted that no person born out of the kingdom, though he be naturalized, except such as are born of English parents, should be capable to be of the privy council, &c. shall not extend to disable any person who before his majesty's accession to the crown was naturalized.

14. 1 Geo. 1. cap. 4. s. 2. No person shall be naturalized, unless in the bill exhibited for that purpose there be a clause to declare, that such person not to be enabled to be privy council, or a member of either house of parliament, or enjoy any office of trust, or have any grant from the crown; and no bill of naturalization shall be received without such clause.

[ 268 ] 15. 4 Geo. 2. cap. 21. s. 1. Children born out of the allegiance of the crown of Great Britain, whose fathers shall be natural-born subjects, shall by virtue of the act of 7 Ann. cap. 5. and of this act, be natural-born subjects.

S. 2. Provided that nothing in 7 Ann. cap. 5. or in this act, shall make any children born out of the ligeance of the crown to be natural-born subjects, whose fathers, at the time of the birth of such children, were or shall be attainted of high treason, either in this kingdom or in Ireland, or where liable to the penalties of high treason or felony in case of their returning in this kingdom or Ireland without licence of his majesty, or were or shall be in the service of any foreign state then in enmity with the crown of Great Britain.

S. 3. If any child, whose father at the time of the birth of such child was attainted of high treason, or liable to the penalties of high treason or felony, in case of returning without licence, or was in the service of any foreign estate in enmity with the crown, (excepting all children of such persons who went out of Ireland in pursuance of the articles of Limerick) hath come into Great Britain or Ireland, or any other of the dominions of Great Britain, and hath continued to reside within the dominions aforesaid for two years, at any time between the 16th of Nov. 1708, and the 25th of March 1731, and during such residence hath professed the Protestant religion, or hath come into Great Britain, &c. and professed the Protestant religion, and died within Great Britain, &c. at any time between the said 16th of Nov. 1708, and the 25th of March 1731, or hath continued in the actual possession or receipt of the rents of any lands in Great Britain, &c. for one year, at any time between the said 16th of Nov. 1708, and the 25th of March 1731, or hath, bona fide, sold or settled any lands in Great Britain or Ireland, and any person claiming title thereto under such sale or settlement, hath been in the actual possession or receipts of the rents thereof for six months between the said 16th of Nov. 1708, and the 25th of March 1731, every such child shall be deemed a natural-born subject of the crown of Great Britain.



(E) Alien. Denization. By whom; and what Persons shall be.

[1.] IF an alien be made a denizen, and the *letters of denization* have a \* *proviso* (usual in such charters) that the denizen shall do his liege homage, and that he shall be obedient and observe the laws of this realm, this proviso is not any condition; for though he never does his liege homage, nor be obedient to all the laws of this realm, yet this will not make the denization void; for if he does not observe the laws he shall forfeit the penalties appointed by them. Basch. 8 Jac. Scaccario Verseline, † [Worselin or Worsely] Manning's case, per curiam.]

\* 32 H. 8. cap. 16. §. 7. enacts, that all strangers (made denizens) shall be obedient to the statutes of 1 R. 3. cap. 9. 14 H. 8. cap. 2. and 21 H. 8. cap. 16. And that † Lane 58. 59. Trin. 7 Jac. S. C.

in all letters patents of denization a proviso for that purpose shall be inserted, save only when the king shall grant special liberties, and then those liberties shall be expressed. & S. P. resolved accordingly.

2. The king cannot grant to any other to make aliens born denizens, but it is by the law itself inseparably united and annexed to his royal person. 7 Rep. 25. b. in Calvin's case, cites 20 H. 7. 8. a.

S. P. by Doderidge J. 2 Roll. Rep. 93. and says the kings of this realm

have been cautious of making many denizens.—Palm. 14. Arg. says, that denizations cannot be but by the king's charter, and that this is a sun beam of the crown, and a prerogative inseparable from the person of the king, and cites 20 H. 7. 8. and that as the kings of England have the sole power, so they have always used it sparingly, and not to grant more than other kings; that Claudius the emperor made at one time all the subjects of the empire denizens of Rome; and H. 2. of France made all the citizens of Antwerp denizens of France; but that this land being an island the king never indenizens many of his neighbours, Ne inde admittantur inimici tanquam in equo Trojano.

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3. He that is born within the king's liegeance is called sometimes a denizen, quasi *deins nec*, viz. born within, and thereupon in Latin is called *indigena*, the king's liegeman, for *ligeus* is ever taken for a natural-born subject; but many times in acts of parliament denizen is taken for an alien born, that is *infranchised*, or *denized* by letters patents whereby the king does grant unto him, quod ille in omnibus tractetur, reputetur, habeatur, teneatur & gubernetur tanquam *ligeus noster* infra dictum regnum nostrum Angliæ oriundus, & non aliter, nec alio modo. But the king may make a particular denization, as he may grant to an alien, quod in quibusdam curiis suis Angliæ audiatur ut *Anglus*, & quod non repellatur per illam exceptionem, quod sit *alienigena* & natus in partibus transmarinis, to enable him to sue only. Co. Litt. 129. a.

4. A denization may be temporary for life, or in tail, and this enables only to purchase; per Mountague Ch. J. 2 Roll. Rep. 95. Trin. 17 Jac. B. R. in case of Godfrey v. Dixon. Cro. J. 539. pl. 7. S. C. & S. P. and it may be for years, &c.—Co. Litt. 129. a. S. P.

5. Denization by letters patents for life in tail or in fee, whereby he becomes a subject in regard of his person, will not enable him to inherit 7 Rep. 7. a. in Calvin's case, S. P.

—It does not enable him to take by descent, *inherit* in England, but according to his denization will enable his children born in England to inherit him. Vaugh. 268. Hill. 21 & 22 Car. 2. C. B. *Craw v. Ramsey*.  
 per Periam J. Mo. 204.—S. P. by Manwood Ch. B. 4 Le. 176.—It enables the party to purchase lands, but *not* to inherit the *lands of his ancestor as heir at law, but as a purchaser* he may inherit lands of his ancestor. Sty. 139. *Andrews v. Baily*.—It enables only *children born after* denization to inherit, and not those born before, as naturalization does. Jenk. 306. pl. 82.  
 —S. P. Arg. Godb. 275. pl. 388.—Hale Ch. J. said it resembles a pardon in case of attainder. Vent. 419.

## (F) The Effect and Operation of Naturalization and Denization.

1. **NOTE** for law, that where an *alien born* comes into England, and brings his son with him who was born beyond sea, and is an alien as his father is, there the king by his letters patents cannot make the son heir to his father, nor to any other, for he cannot alter his law by his letters patents, nor otherwise but by parliament, for he cannot disinherit the right heir, nor disappoint the lord of his escheat. Br. Denizen, pl. 9. cites 36 H. 8.

2. If an *alien born* has issue a son beyond sea, this son is an alien as the father is, and if he comes into England, and is made a denizen, and after has issue another son in England, and he purchases land, viz. the father, the second son shall inherit, and not the eldest son. Br. Discent, pl. 57. cites Doct. & Stud. lib. 1.

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3. If an alien be made denizen by the king's letters patents, yet he cannot inherit to his father or any other; but otherwise it is if he be naturalized by act of parliament, for then he is not accounted in law alienigena, but indigena; but the issue which he has after his being made denizen, shall be heir to him, but not any issue which he had before. Co. Litt. 8. a.

Godb. 275, pl. 388.  
 Hill. 16 Jac. B. R. the S. C. adjournatur.—  
 2 Roll. Rep. 92. Trin. 17 Jac. S. C. adjudged for the plaintiff.—  
 Ibid. 113. S. C. and the judges persisted in their former opinions.—  
 Palm. 13. S. C. adjudged that the brother should have the land, and not the lord by escheat.

4. An alien had issue his eldest son, and afterwards was made denizen, and had issue his youngest son born in England, and died, the eldest son was naturalized, and after purchased copyhold land and died without issue. The question was, whether the younger son should inherit the copyhold, and the doubt grew upon the words of the naturalization act, whereby he was enabled to purchase, inherit, &c. as heir to any ancestor lineal or collateral, but it was not said that they should be heirs unto him. It was objected, that at the time of the father's death the eldest son had no inheritable blood in him, and therefore the youngest son might not be heir to him; but it was answered, that though there was a disability in him, it was not of blood, but from the place of his birth, for the law respects not the blood where there is no allegiance, and there needs not any blood from the father, because the land came not from him, and in the naturalization were these further words, viz. that he, (the younger son) should be adjudged as a natural-born subject, &c. in every respect, &c. to all intents, constructions, and purposes, the consequence is, that he shall have heirs to inherit to him both lineal and collateral, and therefore adjudged that the younger son should inherit. Cro. J. 539. pl. 7. Trin. 17 Jac. B. R. *Godfrey v. Dixon*.

5. *A. B. C. and D. were brothers, aliens, born in Scotland before the union. C. and D. were afterwards naturalized. C. seised of the lands in question, devised the same to the heir of B. and his heirs, and died without issue, after which the eldest son of B. entered, claiming by the devise, against whom the plaintiff, son and heir of D. brought an ejectment as son and heir of D. and brother and heir of C. Resolved, that B. being an alien, could not have any heir by our law in England, where the lands lay, though in Scotland he might, and therefore the devise was void, and so judgment was given for the plaintiff. Lev. 59. Hill. 13 & 14 Car. 2. in the Exchequer-Chamber. Collingwood v. Pace.*

Vent. 413. to 430. S. C. argued by Hale Ch. B. and said by the Reporter to be adjudged.—Hardr. 224. S. C. but very short, but says, that by the opinion of most of the

judges and barons in the Exchequer-Chamber, the younger brother ought to inherit, and not the issue of the elder.

6. *Denization by letters patents enables the party to purchase lands, but not to \* inherit the lands of his ancestor as heir at law; but as a purchaser he may enjoy lands of his ancestor. Sty. 139. Mich. 24 Car. said in case of Andrews v. Baily.*

S. P. by Mountague Ch. J. 2. Roll Rep. 95.—  
\* S. P. be-

cause the making him to inherit would be altering the law by patent, which the king cannot do. Arg. Palm. 14. cites 36 H. 8. Denizen 9 & 37 H. 8. Br. Patents 100.

7. *It was taken for a ground, that no statute of naturalization shall be taken by equity, because it carries with it a prejudice to the subjects in general, by making others sharers with them, not only in the rules, but also in the trades of the kingdom, by which our subjects born are made less capable of acquiring a livelihood; per 3 justices; and for this reason, and also for that hereby other subjects may be disinherited of their lands. Bridgman Ch. J. said, naturalization (if it may be said of a parliament) carries in it somewhat of injustice, and the rather, because it is not agreeable to the policy of other states, as in France and elsewhere, where persons are naturalized they have not so great privileges as here. Sid. 197. Pasch. 16 Car. 2. in the Exchequer-Chamber, in case of Collingwood v. Pace.*

8. *If two brothers aliens are naturalized, they and their heirs shall inherit one another; per 7 judges in the Exchequer-Chamber. Lev. 60. Hill. 13 & 14 Car. 2. Collingwood v. Pace.*

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9. *If alien has two sons born in England, the one shall inherit the other, though none of them can inherit to their father; for the descent between them is immediate, and they shall make their title in mortdancestor, &c. as heir to the brother without mention of the father, and this answers an objection, that though the act enables them to inherit to any ancestor lineal or collateral, yet this is restrained by the words (as if they were born in England) per 7 judges in the Exchequer-Chamber, contra 3. Lev. 60. Hill. 13 & 14 Car. 2. in case of Collingwood v. Pace.*

Sid. 193. 201. S. C. adjudged that the brothers shall inherit one another, and says that the main ground of the judg-

ment that the brothers should inherit the one the other notwithstanding their father was alien, was, because the descent between the two brothers was an immediate descent, and so there could be no other impediment than such as is between the parties themselves; and a father, though an alien, is regarded as a father to confer relationship, though not to have an heir, and so if an inheritrix takes baron, an alien, the baron shall communicate such a quality to their issues, that they shall inherit to their mother, as well as to one another.—Vent. 413. to 430. S. C. argued by Hale, Ch. B. and said by the Reporter to be held accordingly.—Hard. 224. S. C. accordingly.—This judgment is

is contra to Co. Litt. 3. 2. where he says, that they shall not inherit one another.———Adjudged that the one should inherit the other by virtue of the acts of naturalization, per 7 judges against 4. Vent. 429. S. C.

## (G) Actions. What Actions Alien may have, and in what Cases, and where.

1. **I**T is a good *plea in bar of assise* to say that the plaintiff was not born within the liegeance of the king of England, and if he *replies* that he was born, &c. *he shall say where, &c.* Thel. Dig. 4. lib. 1. cap. 6. f. 5. cites 22 Ass. 25.

2. An alien and A. *join in an assise of an office*, the writ shall abate. Jenk. 130. pl. 64. cites 4 E. 4. 9.

Thel. Dig.  
5. lib. 1.  
cap. 6. f. 19.  
cites S. C.  
and Ibid.  
f. 20. re-  
fers to stat.  
31 H. 6.  
cap. 4.

3. It it was moved, where a *merchant stranger hired a carrier to carry his packs to Exeter*, and he opened it by the way, and took part of the stuff, whether this be felony, and the alien *sued to the council* thereof. The Chancellor said that the alien is come by safe-conduct, and therefore is *not bound to sue by the law of the land*, and by trial of 12 men, but may sue here, and it shall be determined according to the law of nature in the Chancery, and may sue there from day to day, and from hour to hour for the speed of merchants, and that they shall not be bound by our new statute, unless they were declarative of the ancient laws, viz. nature, but they shall be ordered by the law of nature, which is the law of merchants, which serves through all the world. Br. Denizen, pl. 5. cites 13 E. 4. 9.

4. In debt upon an obligation, the defendant said that he was born in Denmark, viz. at D. under the obedience of H. king of Denmark, which king and all his lieges were enemies of the king a long time, viz. from anno 8 E. 4. and demanded judgment *fi actio*, by which the plaintiff alleged that he was born at D. in the diocese of York. And the defendant said that he was born as above, *absque hoc* that he was born at D. in the diocese of York, and writ issued to inquire of his birth there; quod nota bene. Br. Trials, pl. 105. cites 19 E. 4. 7.

Turks and  
Infidels are  
not per-

petui inimici, nor is there a particular enmity between them and us; but this is a common error founded on a groundless opinion of Justice Brooke; for though there be a difference between our religion and theirs, that does not oblige us to be enemies to their persons; they are the creatures of God, and of the same kinds as we are, and it would be a sin in us to hurt their persons; per Littleton (afterwards lord keeper to king Charles the first) in his Reading on the 27 E. 3. 17. M. S. 1 Salk. 46. pl. 2.

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Br. Nona-  
bility, pl. 13.  
cites Mich.  
1 E. 6.——  
Ibid. pl. 62.  
cites S. C.——

6. Alien born may bring *action personal*, and shall be answered, and shall not be disabled by his being alien born. Br. Denizen, &c. pl. 10. cites 38 H. 8. per tot. cur.

S. P. accordingly if there be no war between this country and his own; for in such case he shall not have any benefit of the laws here. D. 2. b. pl. 8. Pasch. 19 H. 8. Anon.——Co. Litt. 129. b. S. P. accordingly.——S. P. Arg. Bulst. 134. cites D. 2. pl. 8.——And. 25. pl. 56. S. P. held in C. B. Trin. 6 E. 6.——Gilb. Hist. of C. B. 165. S. P.

7. But

7. *But contra as to real actions.* Br. Denizen, &c. pl. 10, cites D. 2. b. 38 H. 8, per tot. cur, pl. 8. Pasch. 19 H. 8.  
 S. P. held accordingly.—Co. Litt. 129. b. S. P. accordingly.—Gilb. Hist. of C. B. 166. the S. P. because there is no necessity that he should settle among us.—New. Abr. 83. (D) S. P. and the same words.

8. And so it seems in actions mixt. Br. Denizen, &c. pl. 10, Co. Litt. 129. b. S. P. according-  
 cites 38 H. 8. per tot. cur, ly. Gilb. Hist. of C. B. 166. S. P.

9. If an alien be made prior or abbot, the plea of alien born shall not disable him to bring any real or mixt action concerning his house, because it is *en auter droit*, Co. Litt. 129. b.

10. An abbot, &c. alien shall have actions real, personal or mixt for any thing concerning the possessions or goods of his monastery here in England, because he brings the action not in his own right but in the right of his monastery, and not in his natural but in his politick capacity. Co. Litt. 129. a. b. Gilb. Hist. of C. B. 166. S. P.

11. In debt by an executor, it was held that alien enemy was a good plea, and though no war was proclaimed between this kingdom and Spain (whereof the alien was pleaded to be) and that by reason of open acts done by the king of Spain as enemy. Cro. E. 142. pl. 7. Trin. 31 Eliz. Anon. Ow. 45. seems to be S. C. and the court held the plea good; for the

court will not suffer that any enemy shall take advantage of our law. But Periam J. hærebat aliquantulum whether he could be called an enemy in law before such proclamation.—Gilb. Hist. of C. B. 166. says, It has been long doubted, whether an alien enemy should maintain an action as executor; for on the one hand it is said, that by the policy of the law, alien enemies shall not be admitted to actions to recover effects which may be carried out of the kingdom, to weaken ourselves and enrich the enemy; and therefore public utility must be preferred to private convenience: but on the other hand it is said, these effects of the testators are not forfeited to the king by way of reprisal, because that they are not the alien enemy's, for he is to recover them for others; and if the law allows such alien enemies to possess the effects as well as an alien friend, it must allow them power to recover, since that there is no difference, and by consequence he must not be disabled to sue for them, if it were otherwise, it would be a prejudice to the king's subjects who could not recover their debts from the alien executor, by his not being able to get in the assets of the testator.—New. Abr. 84. in the same words.

12. An alien \* enemy shall have an action of debt upon a bond, and for personal things. Adjudged. Mo. 431, pl. 605. Hill. 38 Eliz. Watford v. Marham, \* This seems misprinted in the orig. and that it should be (Amie) or (Friend.)

13. The law of England has been more favourable to aliens as to personal things than the laws of other realms have been; for in France or Italy, if alien acquires goods, and dies, they are confiscated, and if he makes a testament it is void, whereas our law allows them to make a will of them, or otherwise to bring an action for them, and they shall be in better condition in many cases as to their goods than the natural subjects; for the old statutes have given them a more speedy remedy to recover them than they have given to others. Arg. 2 Roll. Rep. 93, 94. Trin. 17 Jac.

14. An alien friend may by the common law have and acquire [ 273 ]  
 by gift, trade, or other lawful means, any treasure or goods personal whatsoever, as well as any Englishman, and may maintain any action



action for the same; for it would be otherwise in effect denying them trade and traffick. 7 Rep. 17. in Calvin's case.

Lutw. 34,  
35. S. C.  
and upon a  
general de-  
murrer the  
plaintiff had  
judgment  
that defen-  
dant res-  
pondeat  
ouster, be-  
cause it  
did not ap-

15. If an alien *enemy* comes hither *sub salvo conductu*, he may maintain an action; if an *alien amy* comes hither in time of peace, *per licentiam domini regis*, as the French protestants did, and *lives here sub protectione*, and a war afterwards begins between the 2 nations, he may maintain an action; for suing is but a consequential right of protection; and therefore an alien enemy that is here in peace under protection, may sue a bond; aliter of one commorant in his own country. 1 Salk. 46. pl. 1. Mich. 9 W. 3. C. B. Wells v. Williams.

appear, but the testator of the plaintiff might come into England in the time of peace, but though he came in time of war, as he continued here without disturbance, it shall be intended that he came with leave.——Lord Raym. Rep. 282. S. C. resolved accordingly, and that the necessity of trade has mollified the too rigorous rules of the old law in their restraint and discouragement of aliens.

16. Where Aliennee is pleaded in abatement, it is triable where the writ is brought; per Holt Ch. J. 1 Salk. 2. pl. 5. Pasch. 1 Ann. B. R. in case of West v. Sutton.

## (H) Actions. Plea. In what Actions it is a good Plea.

Co. Litt.  
129. a. b.  
S. P.——  
Palm. 13.  
Arg. cites  
S. C.——

1. *ALIEN* born is made prior of a house, and brought action, it is no plea that he is alien born, judgment if he shall be answered; for he brought the action as prior in right of the house, and not in his own right. Br. Denizen, pl. 15. cites 39 E. 3.

S. P. accordingly, because he sues in his corporate capacity, and not to recover for himself or to carry the goods or effects out of the land. Gilb. Hist. of C. B. 166.

\* It seems  
this is in-  
tended of  
him who  
was sum-  
moned and  
severed.

2. *Alien and denizen* join in assise, and the *alien* was summoned and severed, and the tenant shewed that the \* other was alien born, and yet the writ was awarded good, and yet the death of him who is summoned and severed after shall abate the writ, as it is said elsewhere. Br. Denizen, pl. 18. cites 11 H. 4. 26.

\* This  
word (not)  
is in both  
editions of  
Brooke, but not in the year-book; and it seems should be omitted.

3. Assise by two barons and their femes. The one baron, who was alien born, was \* not severed, and therefore the writ was awarded good for the other. Br. Nonabilitie, pl. 13. cites 11 H. 4. 26.

4. Alien born is no plea but in actions real and mixed; for by the intercourse in all the world, merchants aliens may merchandize, and their bargains good, and therefore *ex equitate* they ought to have actions for their debts and goods. Br. Denizen, pl. 16. cites 19 E. 4. 6.

Co. Litt.  
129. b.  
S. P. ac-  
cordingly.

5. *Alien born* who was condemned in information, brought writ of error upon this judgment, and it well lies; for it was not contradicted. Br. Nonabilitie, pl. 54. cites 6 H. 7. 15.

——Brownl. 42. S. P.



6. In trespass it was said in B. R. that to say that the plaintiff is alien born, judgment if he shall be answered, is *no plea in action personal; contra in action real*. But this has been in question since that time in the same court, and it was said that alien born is no plea, if he does not say further that the plaintiff is of allegiance of such an one, enemy of the king; for it is no plea in action personal against an alien, that he is of allegiance of such a prince, who is in amity with the king. Br. Nonabilitie, pl. 62. cites Trin. 1 E. 6.

7. In an action for words brought by an alien merchant, the plaintiff had a verdict; and upon its being moved in arrest of judgment that such action did not lie for him, all the court, præter Williams, held clearly that it did, and judgment was entered for the plaintiff. Bulst. 134. Pasch. 9 Jac. Tirlot v. Morris. Yelv. 198. Tuerloote v. Morrison, S. C. adjudged per tot. cur.

## (I) Pleadings. And when to the Writ, or to the Action.

1. **I**T was said by Shard. that when one who was born out of the realm brings action for land, it is a good answer to say that he ought not to be answered; for he was not born within the ligeance of this land. Thel. Dig. 4. lib. 1. cap. 6. f. 6. cites Mich. 13 E. 3. Fitzh. Brief, 677.

2. In assise it is a good bar, that the plaintiff was not born within the allegiance of the king of England, and if the plaintiff avers that he was born in England, he shall shew where, and thence the jury shall come. Br. Barre, pl. 63. cites 22 Ass. 25.

3. In assise by two barons and their femes, the one baron and his feme were severed, and afterwards it was pleaded that the baron who was severed was an alien born, judgment of the writ; but the writ was awarded good. Thel. Dig. 237. lib. 16. cap. 10. f. 37. cites Mich. 11 H. 4. 36.

4. In dower the opinion of the court was, that notwithstanding the tenant pleaded that the feme demandant was alien born, yet if the demandant pleads ability to purchase and sue by act of parliament, the tenant may demand the view, because the tenant in his first plea did not conclude but to the person, notwithstanding that the matter goes to the action; and so note that alien born goes to the action. Br. Denizen, pl. 1. cites 3 H. 6. 55.

5. In debt by J. N. Catesby pleaded actio non; for he was born at D. ultra mare under the king of Denmark, who is enemy to the king, judgment si actio. Per Bryan, if league was between our king and the king of Denmark, which is now broken, peradventure the bond shall be void against the party, but the king shall have it; and for the trial you ought to allege that he was born at such a place in England, without taking any traverse, and the other shall say that born at D. in Denmark, absque hoc that he was born at S. in England, S. C. cited by Anderson Ch. J. Le. 78. 79. If I allege that the plaintiff was born at D. in Scotland, judgment, &c. he may

say that he  
was born  
at D. in  
England, and shall not take absque hoc. Br. Traverse per &c. pl. 262. cites 21 E. 4. 36. per  
Vavisor.

land, prout, &c. Br. Traverse per, &c. pl. 307. cites 19 E. 4. 61  
and the like matter 19 H. 6.

In *indebitatus assumpsit* the defendant pleaded that the plaintiff was an alien enemy born at Roan in France, under the allegiance of, &c. The plaintiff replied he was born at Hamblirgh, under the allegiance of the Emperor, a friend of the king, &c. and traversed that he was born at Roan in France, &c. Upon demurrer the defendant had judgment, because by the traverse Roan is part of the issue, which is very immaterial, the plaintiff should have traversed that he was born under the allegiance of the French king. 3 Salk. 28. Pasch. 5 W. 3. B. R. Progers v. Arthur.—Comb. 212.

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Anon. S. C. says the traverse was, that he was born at Roan, *modo & forma*, &c. Holt Ch. J. thought the traverse ill; and puts an ill issue; for he might have been born at Roan, and yet *infra ligeantiam Angliæ*, as if attending on an ambassador, and therefore he should have pleaded Alien enemy *nee*, &c. Sed adjournatur.

In *debt for an escape*, the defendant pleaded that the plaintiff was an alien enemy, born at Roan in France, under the allegiance of the French king, &c. and the plaintiff replied that he was a natural subject, born at Westminster, in the county of Middlesex; and traversed that he was born in France; and upon demurrer the court held this to be an immaterial traverse; for the plaintiff should have rested, and tendered an issue upon his being born at Westminster. 3 Salk. 28. in the case of Progers v. Arthur, cites Grodeck v. Briggs.—Carth. 265. Brodeck v. Briggs, Hill 4 W. & M. in B. R. S. C. adjudged accordingly, and if the defendant had taken issue upon the plaintiff's being a denizen, as he might, it should be tried where the action is laid, because it is but a transitory matter.

6. A man may plead that the plaintiff is alien born, or Monk professed, *judgment si actio*; for he may use it to the person or to the action, at his pleasure. Br. Barre, pl. 100. cites 32 H. 6. 22.

7. In assise the pleading was, viz. Et super hoc idem Thomas Ive, quoad prædictum Johannem Bagot, petit *judicium brevis assise prædictæ*, quia dicit quod idem Jo. B. est alienigena genitus, & natus extra ligeantiam domini regis Angliæ, viz. apud Pounthois infra regnum Franciæ sub obedientia Caroli nuncupantis se regem Franciæ, adversarii & magni inimici domini regis Angliæ, et hoc parat, &c. unde, &c. petit *judicium de brevi*, &c. And Bagot maintained his writ by his letters patents, by which he was made a denizen by king H. 6. and pleaded them in hæc verba, as appears there. Thel. Dig. 5. lib. 1. cap. 6. s. 17. cites Trin. 9 E. 4. 7. Bagot's case.

8. But Hill. 32 H. 6. 23. in writ of trespass of a house broken, the defendant pleaded that the plaintiff is an alien born at L. out of the ligeance of the king, and demanded judgment of the writ; upon which plea Littleton offered to demur, inasmuch as he ought to conclude to the action, by which the defendant added more to his plea by saying that the plaintiff is and was, the day of the writ purchased, an alien born in the said vill of L. under the ligeance of the king of Denmark, who is enemy, &c. and demanded judgment *si actio*. In the same plea, Ashton said, if an alien, as Lombard, Galiman, or such merchant, who comes here by licence or safe-conduct, and takes here in London or elsewhere an house for the time, if any break the house and take the goods, he shall have action of trespass; but if he be an enemy of the king, and comes in without licence or safe-conduct, it is otherwise. Thel. Dig. 5. lib. 1. cap. 6. s. 18.

9. Thel. Dig. 5. lib. 1. cap. 6. s. 22. says one may see in the new book of entries in Ejectione Firmæ 7. such a form of plea pleaded by the defendant; Et dicit quod prædictus querens ad breve suum prædictum responderi non debet, quia dicit quod idem querens est alienigena

*alienigena in regno Franciæ in comitatu de B. sub ligeancia adversarii domini regis Angliæ de Francia de patre & matre inimicis ipsius domini regis Angliæ, & eidem adversario, suo adhærentibus oriundus, & ingressus est regnum Angliæ absque salvo conductu ipsius domini regis. Et hoc paratus verificare ubi & quando, &c. unde petit judicium si prædictus quer' ad breve suum prædictum responderi debeat, &c.*

10. If an alien, born out of the legiance of the king, sues an *action real or personal*, the tenant or defendant may say that he was born in such a country, which is out of the king's allegiance, and ask judgment if he shall be answered. Litt. f. 198.

So as the tenant or defendant shall not plead Alien-  
nee neither

to the writ nor to the action, but *in disability of the person*, as in case of villenage and outlawry. And Littleton is to be intended of an alien in *legus*; for if he be an alien enemy, the defendant may conclude to the action. Co. Litt. 129. b. — Br. Denizen, pl. 3. cites 9 E. 4. 19. Bagot's case, that in pleading Alien born extra ligeantiam regis, the defendant pleaded it to the writ, and not to the person per hæc verba, *judgment if he shall be answered.* — See Cart. 48. &c. and 191. Richfield v. Udall. — G. Hist. of C. B. 166. S. P. as to alien friend; and that in case of alien enemy it must be pleaded to the action, because it is forfeited to the king as a reprisal for the damages committed by the dominions in enmity with him. — New. Abr. 14. in totidem verbis.

11. The most usual and best pleading in actions brought by an alien is both exclusive and inclusive, viz. *Extra ligeantiam domini regis, &c. & infra ligeantiam alterius regis.* 7 Rep. 16. b. cites 9 E. 4. 7. & Lib. Intrat. Fol. 244.

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12. *Administrator* brought debt on an obligation; the defendant pleaded that the plaintiff was alien, born under the allegiance of P. king of Spain, enemies to the queen; adjudged upon demurrer that he should answer. Cro. E. 683. pl. 16. Trin. 41 Eliz. C. B. Brocks v. Philips.

S. C. cited Cro. C. 9. in pl. 6. as adjudged. — Any alien whatsoever may be

executor. Cited by Bridgman Ch. J. Cart. 191. as 11 Jac. Sir Stephen le Sure's case. — And Ibid. 229. Pasch. 19 Car. 2. in case of Richfield v. Udall. Bridgman held, that an alien enemy executor may bring an action, and he may not be barred. And Ibid. 193. the same was agreed per cur.

14. Alienage may be pleaded *in bar after imparlance*, as well as to the writ before imparlance. Jenk. 130. pl. 64.

15. In assise, where alienage is pleaded to the writ or in bar, after the allegation, the conclusion is that the defendant *petit si querens responderi debet.* Jenk. 91. pl. 77.

16. In debt for rent, &c. the defendant *pleaded the statute 32 H. 8. by which leases, &c. made to aliens artificers are void, and that he was an alien born at Paris, &c. and averred the 3 points of that statute, viz. 1st, That this house was a mansion-house at the time. 2dly, That he is an alien. 3dly, That he is an artificer.* The plaintiff replied that the defendant is not an alien artificer. Upon demurrer it was objected that the replication was double, viz. that the defendant is not an alien artificer, for if he was neither, he was out of the statute; sed non allocatur. But because the replication did \* not allege a certain place where he was born in England, it was held ill, and judgment for defendant if plaintiff would not amend on payment of costs, &c. Sid. 357. pl. 19. Hill. 19 & 20 Car. 2. B. R. Freeman v. King.

\* And so it must be alleged in a real action. Co. Litt. 261. a. b. — 6 Rep. 26. b. 27. a. S. P. in Calvin's case. — S. P. by Anderson. Le. 78. — Saund. 8. S. P.

17. Alien

See Co. Litt.  
s. 195. 127.  
b.

17. Alien brings *trespass*, defendant in his plea should say only *venit & defendit vim & injuriam*, but he must omit (*quando*) because by that word defendant admits a capacity in the plaintiff to sue. Carth. 229. Pasch. 4 W. & M. in B. R. Jentreer v. Jenkins.

18. An action upon the *case* was brought by an executor for work done, and materials found for the defendant by the testator of the plaintiff. The defendant pleads that the father of the plaintiff, who was the testator, and the plaintiff, were alien enemies born at such a place under the obedience of Lewis the French king; judgment *si actio*; to which the plaintiff demurred; and adjudged for the plaintiff. It is not shewn that the testator did not die before the war; so that the plaintiff might be executor, and the action attach in him before the war; and then being dead before he became an alien enemy, he might have an executor; and the action being *en auter droit*, it shall be maintained. Skin. 370. pl. 18. Mich. 5 W. & M. in B. R. Villa v. Dimock.

The pleadings was that the plaintiff was alienigena born in France under the allegiance of the French King adversarii domini regis, &c. nunc & citem adversario suo adversarii domini regis ingressus in regno

19. The defendant pleaded in *abatement*, that the plaintiff was an alien enemy, born in such a place in France. The plaintiff replied that he is *indigena*, and born at such a place in the kingdom of England, & non alienigena modo & forma, prout, &c. & hoc petit quod inquiratur per patriam. And upon a demurrer to this replication, it was held *per curiam* to be ill; for that the plaintiff did not rely upon the first part of it, that he was born in England, and so conclude with an averment that an issue might be taken by the other side, viz. that he was not born in England, and that this matter might be triable by a proper *visne*; but here he hath put *Alien, or Not alien*, in issue, viz. *Non alienigena modo & forma*, which cannot be tried for want of a *visne*; so judgment was given that the bill shall abate. Carth. 302. Pasch. 6 W. 3. B. R. Nichols v. Pawlet.

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*Angliæ absque salvo conductu &c. Et hoc paratus est verificare ubi quando &c. prout curia dicti domini regis & domine regine consideraverit unde petit judicium, &c.* The plaintiff replied, *Quod ipse est indigena in regno Angliæ sub ligantia dicti domini regis & domine regine nunc de patre & matre amicis eorundem domini regis & domine regine nunc oriundus & natus apud London præd. in parochia & uia da præd. & non alienigena prout præd.* (the defendant) superius allegavit & hoc petit quod inquiratur per patriam, &c. The defendant demurred generally, and it was adjudged that the issue was not well taken, because the plaintiff ought not to have concluded to the country; for there being new matter set forth in the replication, he should have given the defendant opportunity to rejoin. 4 Mod. 285. Nichols v. Pawlet. — Nota, if the plaintiff had concluded his replication with an averment only, the negative clause, *Non alienigena*, had been only *surplusage*, and helped upon a general demurrer. Carth. 303.

Where Alien-nee is pleaded in *abatement*, and the plaintiff replies *Indigena*, he may either take issue or conclude *Et hoc paratus est verificare*; but if in bar, he must take issue; per Holt Ch. J. who said that this was the reason of the difference of the 2 precedents in Rastal. Comb. 394. Mich. 8 W. 3. B. R. Texel v. Hooper.

20. *Indebitatus assumpsit*, the defendant pleaded that the plaintiff was *alienigena in regno Franciæ sub ligeantia adversarii domini regis, &c. oriundus*. And upon a demurrer exception was taken to this plea, because it is not a direct affirmative that the plaintiff was *alienigena*; it should have been *natus*, and not *oriundus*. Per cur. in a real action the word (*alienigena*) had been well enough; but some doubt being made whether it was so in this case, a farther day was

was taken to consider of it; and afterwards some precedents being cited out of Raftal, where the word *natus* was supplied by *oriundus*, the plea was held good. 4 Mod. 405. Pasch. 7 W. & M. in B. R. *Derrier v. Arnaud*.

20. If you plead alienage *in bar*, you must lay a place where he is born; but if *in abatement* it is triable where the action is brought. 12 Mod. 125. Pasch. 9 W. 3. Ord. v. Howard.

21. A *scire facias* was brought on a judgment in assise for the assise of Marshal; the defendant pleaded in abatement, that the plaintiff was an alien enemy, et hoc, &c. Plaintiff replied, he was a subject born, viz. at such a place in England, et hoc paratus est verificare; defendant demurred, and per Holt Ch. J. the plaintiff should have concluded to the country; for where alienage is pleaded in abatement, it is triable where the writ is brought; for which reason the replication must conclude to the country; aliter where alienage is pleaded in bar; therefore in that case the replication must conclude, *Et hoc paratus est verificare*. 1 Salk. 2. pl. 5. Pasch. 1 Ann. B. R. *West v. Sutton*.

22. Though an alien under the queen's protection be enabled to sue, yet if he brings an action and alienage is pleaded against him, whether his protection be special or general he ought to plead it. Per cur. Farr. 150. Hill. 1 Ann. B. R. *Silvester's case*.

For more of Alien in General, see Trial, and other proper Titles.

## Alienations.

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(A) At Common Law. Licence. The Original, and the Cause, and in what Cases necessary.

1. 9 H. 3. **N**O freeman shall give or sell so much of his land, that of the residue the lord of the fee may not have the services due to him.

In assise, it was said, and in a manner not much de-

nied, that before anno 20 H. 3. the tenant of the king might alien as freely without licence as another man might, and says see stat. thereof, *Prerogativa Regis*, cap. 4. Br. Alienation, pl. 10. cites 20 Ass. 17.

Note, per Hank. that no fine was paid for alienations by tenant of the king till the time of king H. and that in his time the king's tenant might alien without making fine. Brooke says, quære what Henry he intends, and it seems H. 3. Br. Alienations, pl. 6. cites 14 H. 4. 3.

By this statute the king took benefit to have a fine for his licence, before which statute no fine for alienation was due to the king; for it is adjudged, That for alienation in the time of H. 2. no fine was due; and it appears in other books, that if an alienation had been made before 20 H. 3. no fine was due to the king for alienation. Co. Litt. 43. a.—And it is to be observed, that no record can be found, that either a licence of alienation was sued, or pardon for alienation was ob-



tained for an alienation without licence at any time before the 20th year of H. 3. and it is held that licence for alienation grew from the statute. Co. Litt. 43. b.

Tenant of the king in capite cannot alien in tail without licence.

Br. Alienations, pl. 22. cites 45 E. 3. 6. — He cannot give in tail. Br. Alienations, pl. 24. cites 15 E. 4. 12.

2. 17 E. 2. cap. 6. Enacted, that none that hold of the king in capite by knight's service may alien the more part of his lands, so that the residue thereof be not sufficient to do his service except he have the king's licence, but this may not be understood of members and parcels of such lands.

3. Rent was held of the king, and aliened without licence, by which the king seised. Br. Alienations, pl. 18. cites Fitzh. Avowry, 3 E. 3.

4. *Præcipe quod reddat* is brought against an abbot, who vouched to warranty, and the vouchee at another time made default after default, and it was awarded that the demandant recover against the tenant, and the tenant over in value, but that execution shall cease till it was inquired of the collusion, by which it was found no collusion, and the abbot prayed execution in value, and it was doubted by the court, whether he shall have execution without licence by reason of the mortmain, Quod mirum! where it was found no collusion. Br. Alienations, pl. 2. cites 48 E. 3. 29.

S. P. that he may charge the land in fee by grant of a rent-

charge in fee. Br. Alienations, pl. 19. cites 7 H. 6. 3. — And this is good against the king after escheat. Ibid. cites 40 E. 3. 5.

\* S. C. cited Le. 8. and says, that upon such grant of the

reversion the tenant for life is not bound to attorn, wherefore it seems, that if he does attorn the king shall seise presently. — \* 2 Inst. 67 S. P.

[ 279 ] So in the time of H. 8. he could not alien for life without licence; for it alters the franktenement. Br. Alienations, pl. 22.

7. If partition be made in Chancery between parceners who are heirs of the king's tenant, which is not equal, this cannot be redressed but by licence of the king; for the king shall be always ascertained of his tenant. Br. Alienations, pl. 26. cites 10 H. 4. 5.

8. Where the king was lord, and there was mesne and tenant, the tenant might alien without licence; because he was not immediate tenant to the king; but the mesne could not alien his mesnalty without licence; for this is held immediately of the king. Br. Alienations, pl. 27. cites Fitzh. Avowry, 38.

9. If the king by his letters patents gives land to me and my heirs, &c. and he grants by the same patent that I shall be as free in this land as he is in his crown, and I afterwards alien without licence, the king shall certainly have a fine for this alienation, per Paston; for this is vested in him by reason of his prerogative, which cannot pass out of his person by such general words. 14 H. 6. 12. b. at the end.

10. The



10. The licence of alienation is to *ascertain the king of his tenant*. Br: Alienations, pl. 9: cites 21 H. 7. 7.

11. Note, that for *burgage tenure of the king* a man may alien without licence well enough. Br: Alienations, pl. 36. cites 6 E. 6.

12. The *reason of taking the fine pro licentia concordandi* is, because by means of this concord the king loses the fines or amer- tiaments which should have been due to him upon the judgment or nonsuit, and other advantages. 2 Inst. 511: And it is an ancient revenue of the crown: Ibid.

13. Manwood Ch: B. was of opinion, that this prerogative to have a fine for alienation without licence is *by the common law*, and not by any statute. Le. 8. 9. in pl. 11: Mich. 25 & 26 Eliz.

14. The prerogative to have a fine for alienation without li- cence, had its *beginning upon the original creation of seignories*. Arg. Le. 8. in pl. 11: Mich. 25 & 26 Eliz. in Tresham's case.

It was com- menced up- on this rea- son, that none ought

to enter the fee of the king, nor to entitle himself to become his tenant without his licence. Mo: 173. pl. 303. in Sc:

## (B) Licence. Pursued How.

1. **T**HE king granted licence to alien the manor of D. render- ing 5l. per annum, and he aliened the said manor, except 12 acres; rendering 5l. per annum; the licence shall not serve for the variance, and also parcel shall be charged with the whole 5l: and also the king shall be ascertained who shall be his tenant. Br. Alienations, pl. 23: cites 30 E. 3. 17. and Fitzh: Fine, 53.

2. Licence to purchase lands or tenements extends to advowson. Br. Alienations, pl. 35: cites Fitzh: Grants, 102.

3. Where the king licences abbot and covent to make a feoffment; if the abbot alone does it, this is not warranted by the licence, and yet the covent cannot make a feoffment, but only give their as- sent; and if it be made by the abbot alone; his covent may re- cover again, and then the king shall be misconusant of his tenant, and e contra where the abbot and covent do it, per Frowike; and Vavisor J. was of the same opinion. Br. Alienations, pl. 9: cites 21 H. 7. 7.

But contra of a dean and chapter, per Frowike and Vavisor. Br: Aliena- tions, pl. 9. cites 21 H. 7. 7.

4. Where the king licences me to make a feoffment by deed; I can- not make it without deed, nec e converso. Br. Alienations, pl. 9. cites 21 H. 7. 7. by Frowike and Vavisor:

[ 280 ] If a man ob- tains licence to alien the

manor of Dale, and all his lands and tenements in Dale, he cannot alien by fine; for fine shall be certain, so many acres of land, so many of meadow, so many of pasture, &c. and the alienation ought not to vary from the licence. But it is otherwise used with overments that all is one. Br. Ali- nations, pl. 30. cites Pasch. 31 H. 8.

## (C) Licence. Good or not.

1. **I**F the king grants licence to his tenant to alien the land held *in capite*, and the king dies before the alienation, the tenant cannot alien; for now he is tenant to the new king. Br. Alienation, pl. 25. cites Pasch. 2 E. 3.

2. But licence of one king granted to alien *in mortmain*, and the king dies before the alienation, this shall serve in the time of another king. Quod nota. Ibid.

## (D) Licence. Forfeiture by not having Licence.

*Quare impedit* was brought by the king, and made his title, because J. N. held of him *in capite* the moiety of the manor of D. to which the advowson is appendant, and aliened without licence. Br. Alienations pl. 1. cites 47 E. 3. 21.

1. **I**N quare impedit the king made title to present, because the advowson was held of him *in chief*, and was aliened without licence, by which he presented, &c. And admitted for good title. And yet it is *not alleged that the alienation is found by office*; quod nota; and therefore it seems that the king may have *chattle* without office. Br. Prerogative, pl. 33. cites 2 E. 3. 71.

S. C. cited Sav. 16. in pl. 41. — 2 Inst. 66. says that some did

2. It is said that the *seizure is only as a distress for a fine* to the king, and not to give the king the franktenement, and after fine made, the alienee shall re-have the land. Br. Alienations, pl. 10. cites 20 Aff. 17.

hold, that by alienation without licence the lands were forfeited to the king, by reason of the words of Magna Charta, that no freeman shall give, &c. but that others held, that the land should only be seized as a distress, and a fine to be paid for the trespass, which Id. Coke takes to be the better opinion. — Jenk. 56. pl. 4. says it was a forfeiture of the whole before the 1st of E. 3. 12.

Till this statute it remained a question undetermined, whether in such case the land was forfeited, or to be seized only as a distress; and this act extended to lands holden of the king by grand serjeanty, aliened without licence. 2 Inst. 66. — By this statute the alienation shall stand, and it is only finable. Jenk. 88. at the end of pl. 72.

3. See stat. 1 E. 3. Parl. 2. cap. 12. *That land held in capite, which is aliened without licence, shall not be by this forfeited, but the king shall take a reasonable fine.* Br. Alienations, pl. 34.

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4. Tenant of the king aliened in fee, and died, his heir within age, the king shall not have the ward; for *the alienation is good, save the trespass to the king*, which is only a fine by seizure; but the alienation is good. *Contra* if the alienor was tenant in tail. Br. Alienations, pl. 29. cites 26 H. 8.

S. C. cited Sav. 16. in pl. 41.

5. If the alienation without licence be *found by office*, the king shall have the issues of the land from the time of the inquisition taken, and not before. Br. Alienations, pl. 29. cites 26 H. 8.

6. The

6. The fine for alienation was to be paid by the alienee, or those that claimed by or under him, and if the fine was not paid, the land should be seised into the king's hands; and the intent of a parliament is always intended just and reasonable, and therefore if a disseisor of lands in capite makes an alienation without licence, and the disseisee enters, the land shall not be seised for the fine; for the disseisee is in by a title before the alienation, and so in other like cases. If he in the reversion levies a fine of lands holden in capite without licence, the lessee for life shall not be charged with the fine, because that estate was before the alienation; but yet in a quid juris clamat the lessee shall not be compelled to attorn, because the court will not suffer a prejudice to the king in like manner as if the reversion had been aliened in mortmain, without the king's licence. 2 Inst. 67.

7. Tenant in capite made gift in tail to J. S. upon condition that if he aliened it should be lawful for him to enter. J. S. aliened. Tenant in tail entered for the condition broken. It was adjudged that a fine for the alienation of the tenant in tail was due to the queen, and that the queen might charge the lands, in whose hands soever they came, for this fine; and the duty was not discharged by the entry of the tenant in tail for the condition broken, but the tenant of the land was chargeable for the same. Mo. 172. pl. 305. Trin. 24 Eliz. in the Exchequer, Tresham's case.

Le. 8. pl. 11. Mich. 25 & 26 Eliz. S. C. adjudged accordingly.

## (E) Licence. Fines.

1. BY the statute 1 E. 3. Parl. 2. cap. 13. it is enacted, that lands held of honours, and aliened, shall not make fine, because the law does not give fine for such alienations; and so the statute is in affirmance of the common law; and so is Magna Charta. Br. Alienations, pl. 34.

It was found by office, that J. N. purchased the manor of D. which was held of

the king in chief without licence, and the other said that it was held of the honour of Pickering, parcel of the dutchy of Lancaster; and it was admitted there, that if it be held of the honour, and not in capite, he may alien without licence. Br. Alienations, pl. 11. cites 29 Aff. 38.

A man shall not make fine for alienation for land held of the king of an honour, but for land held in capite; and tenure of honour, nor a manor, is not in capite; for it is not of the person of the king. But Brooke says Cave; for there are certain honours which are in capite, and there is a writ that the escheator shall not grieve a man for alienation of land held in capite as of an honour; for this is in capite of the honour, and not in capite of the person of the king, and then he shall not make fine for alienation of it. Br. Alienations, pl. 33. cites the Register, fol. 184.

2. If a bishop, tenant of the king in capite, had leased for life, he shall make fine for the alienation. Br. Alienations, pl. 24. cites 46 E. 3. and Fitzh. Forfeiture 18.

3. It was said for law, that the fine for alienation is the value of the land aliened by the year, and the same law of fine for intrusion upon the king. But the fine to have licence to alien is only the 3d part of the annual value of the land that shall be aliened. Br. Alienations, pl. 29. cites Pasch. 31 H. 8.

4. But for licence to alien in mortmain, the fine is the value of the land for 3 years. Ibid.

[ 282 ] Sav. 16. in pl. 42. cites S. C. — 2 Inst. 67. says that upon conference had with the

king's officers and the judge, it was ordained that seeing the king's tenant could not alien without

without licence, for if he did he should pay a fine, that for a licence to be obtained, the king should have the 3d part of the value of the land, which was holden reasonable, and the feoffee should pay the sum, because his land was otherwise to be charged, and rid of the trouble and charge by the writ of Quo titulo ingressus est; and if the alienation was without licence, then a reasonable fine by the statute was to be paid by the alienee, which they resolved to be one year's value, which ever since constantly and continually hath been observed and paid.

5. Though the restraint of Magna Charta, as to *avoidance of the state of the feoffee* by the heir, is taken away by the statute 18 E. 1. of quia emptores terrarum, yet that is only secundum quid, and not simpliciter; for in respect of the king, the fine for alienation remained due, and herewith agreed constant and continual usage, 2 Inst. 67.

6. Till the statute of wills, 32 H. 8. cap. 1. none ever paid fine in the Hanaper who recovered land by sufferance against the king's tenant who held in capite; but by this statute now he shall pay fine for recovery as well as for feoffment. Br. Alienations, pl. 32.

7. 12 Car. 2. cap. 24. takes away all tenures by knight's service, and all fines, seisures and pardons for alienations, and all incidents thereto, saving fines for alienations due by particular custom of particular manors, &c. other than of lands holden immediately of the king in capite, and turns all tenures into free and common socage.

## (F) Fines, Pardon of Fines or Forfeiture. Construed How.

Br. Alienations, pl. 20. cites S. C. — Jenk. 92. pl. 79. S. C. says this pardon discharges this alienation, for the enters as tenant without the king's licence, and this is an alienation without licence, and a wrong done to the king; By the justices.

1. **T**ENANT of the king made a feoffment in fee, and retook to him and his feme in tail, the remainder to his right heirs, and died, and the king pardoned to the feme all alienations, but not fines for alienations, nor trespass, and yet it was held, that by this he shall not have fine for alienation; but the feme by this cannot alien; and note, that this tenant, who aliened, held of the king in capite. Br. Alienations, pl. 8. cites 14 H. 6. 26.

enters as tenant without the king's licence, and this is an alienation without licence, and a wrong done to the king; By the justices.

## (G) What shall be said such an Alienation.

1. **I**T seems that recovery suffered by default is a demise or alienation. Br. Alienations, pl. 32. cites Mich. 4 E. 3.

[ 283 ] 2. [And therefore] if a man recovers in value against an abbot, the founder shall have writ of contra formam collationis by the statute which speaks only of alienations, therefore see there that recovery is an alienation. Br. Alienations, pl. 32. cites F. N. B. 211. But till the statute of wills, 32 H. 8. cap. 1. none ever paid a fine in the Hanaper who recovered land by sufferance against the tenant of the king who held in capite, but now by this statute he shall pay a fine for recovery as well as for a feoffment, and therefore it seems properly no alienation; but quære; for it is a good

good sufferance to make it to be the land of another, which is *alienum facere*, but yet this is supposed to be by title. Br. Alienations, pl. 32. cites Mich. 4 E. 3.

3. Where an *advowson* descends to 3 coparceners among other lands held in capite, by which the king is possessed, and *partition is made in Chancery*, so that the *advowson* is allotted to the one in allowance of other land, &c. and after livery sued they make a composition to present by turns, this amounts to an alienation of what the king was ascertained of one sole tenant before by matter of record, and now all 3 are tenants by matter in fact without licence. Br. Alienations, pl. 7. cites 21 E. 3. 31.

Br. Quare impedit, pl. 73. cites S. C.

4. In assise 3 jointenants were of land held of the king in capite, and the one released to his two companions, and pleaded pardon of it, *Quod mirum!* For where three jointenants are, and the one releases to the other 2, there needs no licence nor pardon, for the 2 are in by the first feoffor, and not by him who released, as it is agreed Mich. \* 37 H. 8. Br. Alienations, pl. 4. cites 8 H. 4. 8.

\* Br. Alienations, pl. 31. cites S. C. accordingly. — And yet it is said in assise of rent, 40 E.

5. that where two jointenants of the king are, and the one releases to the other, he ought to have licence, and such licence was pleaded for such release in the assise of the duke of York, 8 H. 4. tit. Licence in Fitzh. 1. but Brooke says, *Quare* if of necessity, for it seems to be no alienation, *ibid.*

5. But where the one releases to the one of the other 2, there he, who took the release, is in of the 3d part by him; contra if he had released to all his companions, and with this agrees \* 33 H. 6. fol. 4. and so it is used in the Exchequer that this is no alienation; *Quod nota.* Br. Alienations, pl. 4. cites 8 H. 4. 8.

\* Br. Alienations, pl. 31. cites S. C. accordingly. — And where a

man releases by fine to the tenant of the king, this is no alienation. *Ibid.* cites Pasch. 37 H. 8. — Contra of a fine upon conscience of right come ceo, &c. for this is estate made by conclusion. *Ibid.*

6. A recovery of the land against the tenant shall bind the lord also, and recovery of the services against the lord shall bind the tenant also; *Quod nota*; and therefore no alienation. Br. Alienations, pl. 32. cites 39 H. 6.

7. Devise by testament was taken to be an alienation. Br. Alienations, pl. 37. cites H. 3. M. 1.

8. M. tenant in capite covenanted 4 Eliz. with A. and B. to suffer a recovery before Easter, to the use of himself for life, with remainders over, and with power to revoke and declare new uses by deed or will. The queen licensed M. to alien to A. and B. without mentioning any declaration of uses. M. suffered a recovery, and in 34 Eliz. by will revoked the uses, and declared new uses. Upon conference with the two Ch. J. and other justices, it was adjudged in the Exchequer, that the queen shall not have fine for this execution of the uses, because the execution of them was by statute, viz. 27 H. 8. of uses, whereto every one is party, and so cannot do wrong; and because all the new uses arise out of the possession of the conusees, there needs not any new licence for limiting any new use to arise out of the said recovery. 6 Rep. 27. b. Pasch. 43 Eliz. in the Exchequer. Lord Mountague's case.

9. So where S. levied a fine of capite lands without licence to the uses in the indenture, viz. to himself for life, &c. with a proviso to limit by writing the same lands to any wife which he should after marry, for a jointure. Afterwards the alienation is pardoned by statute of 13 Eliz. and then he marries, and by writing limits the lands to his wife for life, and dies. Adjudged that no fine shall be paid for this limitation. 6 Rep. 28. b. cites it as adjudged in the Exchequer, Pasch. 43. Eliz. Smith's case.

## (H) At what Time it might have been by Licence.

S. P. Br. Alienations, pl. 35. cites Fitzh. Grants, pl. 103. — But see elsewhere, that the heir may alien by fine before that he has sued livery. But contra by feoffment. Ibid. cites 21 H. 7. 7.

1. **I**F the king has land by seizure of a prior alien in time of war, or the temporalities of a bishop by seizure for any contempt, or has land of the heir of his tenant who holds in capite for primer seisin, &c. in these cases, if the king licences the party to alien, or make a feoffment during the time that the king has possession, the party cannot alien, notwithstanding the licence, till he has the possession out of the hands of the king; for when the king seises land for alienation without licence, and licences the feoffee to make feoffment, he cannot do it till he has the possession out of the hands of the king, and not before, and then he may execute his licence. Br. Alienations, pl. 9. cites 21 H. 7. 7. per Frowike Ch. J.

2. So where he has land in ward, or for primer seisin. Br. Alienations, pl. 9. cites 21 H. 7. 7. per Frowike Ch. J.

3. So where the king has a term because the termor is outlawed, and he licences the lessor to make a feoffment, he cannot execute it during the king's possession, but the other justices said it was a very dubious case, and that they would be advised thereof. Br. Alienations. pl. 9, cites 21 H. 7. 7. per Frowike Ch. J.

## (I) Pleadings.

1. **S**CIRE Facias issued upon office found that W. was seised of certain tenements in B. in fee, and died seised, and the land descended to R. his son and heir an idiot, and it was held of the king in chief, and N. had entered, who came and pleaded a release of the heir to M. who enfeoffed M. absque hoc that he was idiot; per Finch. we pray upon his conuſance that the land be seised into the hands of the king, & non allocatur, because the writ should say why the land should not be seised into the hands of the king for cause of the ideocy, and the alienation is not comprised in the writ, and therefore he shall not answer to the other point without other garnishment for this purpose; Quod nota; and it is said there, that upon alienation without licence a man cannot traverse the tenure of the king in capite till the office be found of the alienation and tenure, for a man



shall not traverse the title of the king before it be found by office.  
Br. Alienations, pl. 14. cites 50 Aff. 2.

\* 2. It was touched by the serjeants at the bar, that if the *land* was in the king's hands by 20 divers titles, the party shall answer to all the titles. Br. Alienations, pl. 16. cites 4 H. 7. 5.

For more of Alienations in General, see **Conditions, Fines,** and other proper Titles.

## (A) Almanack.

1. **W**HETHER such a day of the month was on a Sunday or not, and so not a Dies juridicus, is triable by the country or the almanack. D. 182. pl. 55. Pasch. 2 Eliz. in case of Fish v. Brockett. Le. 242. pl. 328. Pasch. 29 Eliz. B. R. Page v. Faucett, it was said

that the court might judicially take notice of almanacks, and be informed by them; and cited Roberts's case in the time of Id. Catline; and Coke said that so was the case of Galery v. Banbury, and judgment accordingly.—Cro. E. 227. pl. 12. S. C. and held that examination by almanacks was sufficient, and a trial per Pais not necessary, though the error assigned, viz. that the 16th Feb. on which day judgment was said to be given, was on a Sunday, was an error in fact; and the judgment was reversed.

2. Almanack is *part of the law* of England, of which the court must take judicial notice; per Holt Ch. J. 6 Mod. 41. Mich. 2 Ann. The Queen v. Dyer. S. P. by Holt, Ch. J. and so is annus bis-

sextilis, and that it is the same in case of moveable feasts, and the diversity between them and fixed feasts is ridiculous; but the almanack to go by is that annexed to the Common Prayer Book. 6 Mod. 81. Trin. 2 Ann. B. R. in case of Brough v. Perkins.—3 Salk. 69. S. C. but S. P. does not appear.—The diversity of fixed and moveable feasts was condemned per tot. cur. For we know neither the one nor the other but by the almanacks, and we are to take notice of the course of the moon. 6 Mod. 159. 160. Pasch. 3 Annæ, B. R. in case of Harvey v. Broad.—Ibid. 196. S. C. and Holt Ch. J. said, that at the council of Nice they made a calculation moveable for Easter for ever, and that is received here in England, and become part of the law; and so is the calendar established by act of parliament.—2 Salk. 626. pl. 8. S. C. accordingly per cur.

3. Whether the *patent to the company of Stationers for sole printing* of almanacks be good or not, see 10 Mod. 105. The Company of Stationers v. . . . .

For more of Almanack in General, see other proper Titles.

## (A) Almoner.

## (A) Almoner.

1. **T**HE almoner is accountable by 6 E. 6. 16. per Mr. Andrews in his reading on this statute, Aug. 1628. Cited D. 77. pl. 37. Marg.

\* D. 77. pl. 37. Mich. 6 E. 6. Alington v. Cox, contra — If a *felo de se* is indebted to the king, such debt shall be paid before the almoner shall distribute. Savil. 60. pl. 129.

2. The almoner has not any interest, but is minister and has disposition of the alms of the king durante bene-placito; and if the almoner commit treason, and be *attaint*, this is no *forfeiture* of what is granted to him in the usual form, but only during his life, yet the king may grant it at will without recital, because it is a less estate than he has, and if he grant the goods and chattels of *felo de se*, he \* need not recite the grant of them made to the almoner, nor to determine his will as to them. 1 Rep. 50. in Altonwood's case, cites Hale's case.

For more of Almoner in General, see other proper Titles.

## Ambassador.

(A) Ambassador. Who. And How considered. And How far protected and privileged as to himself and Servants.

1. **T**HE opinion of Justice Ashton, 39 H. 6. 39. was that an ambassador ought to be sent to the Pope; but there have been many precedents to the contrary; for the Pope is a temporal as well as spiritual prince. 4 Inst. 156. cap. 26.

The question was, an Legatus qui rebellionem contra principem, ad quem legatus, concitat, legati privilegiis gaudeat, & non ut hostis poenis subjaceat. And it was resolved that he had lost the privilege of an ambassador, and was subject to punishment. 4 Inst. 152. cap. 26. cites 13 Eliz. The bishop of Ross's case,

2. There being amity between king H. 8. and the French king, and enmity between H. 8. and the Pope, R. Pole, a rebel and traitor to the king of England, flieth to Rome, whom the Pope, being in amity with the French king, sendeth as ambassador to him: The king of England demanded his rebel of the French king, notwithstanding he was sent as ambassador; sed non prævaluit. 4 Inst. 153. cap. 26. cites it as in the time of H. 8.

Ambassadors

Ambassadors ought to be kept from all injuries and wrongs by the law of all countries and of all nations. They ought to be safe and sure in every place, insomuch that it is not lawful to hurt the ambassadors of our enemies, and herewith agrees the civil law. And if a banished man be sent as ambassador to the place from whence he is banished, he may not be detained or offended there, and this agrees also with the civil law. 4 Inst. 153. cites it as resolved Hill. 12 Jac. Palachie's case.

\* 3. At this day there can be no ambassador without letters of credence of his sovereign to another that hath sovereign authority. 4 Inst. 153. cap. 26. cites it as resolved Hill. 12 Jac. in Palachie's case.

Omnis legatus est agens, but omnis agens is not legatus; for if he be sent

from a sovereign power to another of sovereign power to treat between them, although in his letters of credence he be termed an agent or nuntius, yet he is an ambassador or legate. 4 Inst. 153. cap. 26.

4. P. an ambassador was sent by the emperor of Morocco, then at war with Spain, to the states of Holland, and gave him a commission to take Spaniards and their goods. Accordingly he took 2 Spanish ships, and he together with the prizes were driven by stress of weather into England. The Spanish ambassador here charged him at the council-table with piracy, and the lords of the council referred it to the chief justice of England, the master of the rolls, and the judge of the admiralty, who all agreed that by this taking he is not in judgment of law said to be a pirate, in regard the king of Spain and the king of Morocco were enemies, and that open hostility is between them, and therefore such taking from an enemy is legalis captio; but admit that P. was no ambassador, yet by reason of the enmity between the two kings, he could not be indicted as a pirate before commissioners upon the statute of 28 H. 8. cap. 15. because one enemy cannot be a felon for taking the goods of another. See 4 Inst. 152. 153. 154. cap. 26. and 3 Bulst. 27. 28. Pasch. 13 Jac. Palachie's case.

5. But if a foreign ambassador, being prorex, commits here any crime, which is contra jus gentium, as treason, felony, adultery, or any other crime which is against the law of nations, he loses the privilege and dignity of an ambassador, as unworthy of so high a place, and may be punished here as any other private alien, and not to be remanded to his sovereign but by curtesy; and so of contracts that be good, jure gentium, he must answer here. But if any thing be malum prohibitum by any act of parliament, private law, or custom of this realm, which is not malum in se jure gentium, nor contra jus gentium, an ambassador residing here shall not be bound by any of them; but otherwise it is of the subjects of either kingdom, &c. 4 Inst. 153. cap. 26.

An ambassador is privileged by the law of nature and nations; but if he commits any offence against the law of nature or reason, he shall lose his privilege, but not if he offend

against a positive law of any realm, as for apparel, &c. Agreed by the civilians. Roll. Rep. 175. pl. 11. Pasch. 13. Jac. B. R. Marth's case, alias Palachie's case.—3 Bulst. 27. S. C.

By the law of nations, if an ambassador compasses or intends the death of the person of the king in whose land he is, he may be condemned and executed for treason; but if he commits any other treason besides this, it is otherwise; but he ought to be sent to his own realm; per Bacon, attorney gen. Roll. Rep. 185. pl. 17. Pasch. 13 Jac. B. R. in case of the king v. Owen, alias Collins.

6. The office of an ambassador does not include a procuration privata, but public for the king, nor for any several subject, otherwise than as it concerns the king, and his public ministers to protect them, and

and procure their protection in foreign kingdoms in the nature of an office and negotiation of state, and therefore they may and ought to mediate, prosecute, and defend for them, or any of them, at the council-table, which is as it were a council of state; but when they come to settled courts, which do and must observe essential forms of proceedings, viz. Legitimos processus, then they must be ruled by them, and not confound all rules, except some precedents could be found in Chancery; per Hobart Ch. J. and Nichols, on a reference to them by the Ld. Chancellor. Hob. 114. pl. 136. *Servienti d'Acuna* (the Spanish ambassador) v. Bingley.

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7. On a bill in Chancery against an English ambassador at the court of Spain to redeem an old mortgage, the court ordered proceedings to stay for a year and day from this time, unless defendant return sooner; per Ld. Somers. Upon debate it was agreed a *protection* lies for an ambassador *Quia profecturus*, or *Quia moraturus*, and may at law cast an *essoign for a year and day*, and may afterwards *renew it*, if the occasion continues. 2 Vern. 317. pl. 304. Pasch. 1694. *Pilkington v. Stanhope*.

\* Defendant said that he was a menial servant to the Mecklenburgh

3. 7 Ann. cap. 12. s. 3. *All process, whereby the person of any ambassador, or public minister of any foreign prince or state, or the domestic servants of any such ambassador, &c. may be arrested, or his goods distrained, shall be adjudged void.*

ambassador. It was held that menial servants are not within the act, the words being (domestick) or (domestick servants,) who are such as are employed in and about the household affairs only. Rep. of Pract. in C. B. 134. cites it as 7 Geo. 2. *Toms v. Hammond*.

The defendant, a courier to the Spanish ambassador, moved to stay proceedings. The plaintiff alleged the defendant was a trader. It was answered, the trade was so very inconsiderable that it could not amount to a bankruptcy. It was again replied that a probable cause will make a bankrupt; and it was further alleged, that the defendant was *no domestick, had no settled yearly wages*, and that being registered in the sheriff's office was not material; so the court discharged the rule to stay proceedings. Rep. of Pract. in C. B. 134. Mich. 10 Geo. 2. *De-Ceriffay v. O'Brian*. — Barnes's Notes in C. B. 281. Hill. 9 Geo. 2. S. C. accordingly; and cites Mich. 10 Geo. 2. *B. R. Ward v. Purcell*.

A domestick of the duke of Holstein, resident here, was arrested, and thereupon gave a bail-bond; and it was moved upon this statute to set the same aside, all the terms required by the act being complied with, and thereupon the arrest was set aside, and the bail-bond vacated. 8 Mod. 288. Trin. 10 Geo. 1. *Crosse v. Talbot*.

9. S. 4. *The persons suing forth such process, their attornies and solicitors, and the officers executing the same, being convicted thereof by confession of the party, or by the oath of one witness before the ld. chancellor and the chief justices, or any two of them, shall be deemed violators of the laws of nations, and shall suffer such penalties and corporal punishments as they, or any two of them, shall judge fit.*

S. 5. *No merchant or trader within the description of any of the statutes of bankrupt, putting himself into the service of any ambassador, shall have any benefit by this act; and no person shall be proceeded against as having arrested the servant of an ambassador, &c. unless the name of such servant be first registered in the secretary's office, and transmitted to the sheriffs of London and Middlesex, who must hang it up in some public place in their office.*

Abr. Equ. Cases 350. S. C. says

10. A servant to the Genoese ambassador brought a bill in Chancery. It was moved, that he should not proceed till he gave security

curity by bond in 40*l.* penalty for payment of costs of suit if awarded against him, in the same manner as where a plaintiff is beyond sea; and a precedent was cited where a like order was made in the case of an ambassador's servant plaintiff in this court, and dated 25 July, 8th of Ann. And it was ordered accordingly. 2 Wms's. Rep. 452. pl. 142. Goodwin v. Archer. that this order was made after answer put in, and that the reason of it was, because by the 7th Ann. all process against ambassadors and their servants are made void, so that if the bill be dismissed, no process could issue against him.

11. The resident from Venice made affidavit, that one taken in execution was his secretary, and that his name was entered in the secretary's office, though not transmitted to the sheriff of Middlesex till after he was arrested, and upon affidavit that the secretary offered to shew his testimonial to the officer, and that he really exercised the office, and notice being given of the motion, the court discharged him. Barnard. Rep. 79. 80. in B. R. Mich. 2 Geo. 2. Ward v. Purcel.

12. To be a privileged servant to an ambassador within the statute 7 Ann. it is not required that the party actually live in the ambassador's house, but neither is it enough that the party is registered in the secretary's office as a servant, but when he comes for the benefit of the act, he must shew the nature of his service, that the court may judge whether he is a domestick servant within the meaning of the act of parliament. Gibb. 200. Hill. 4 Geo. 2. B. R. Wigmore v. Alvarez.

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13. An affidavit for discharge of one arrested, as being an ambassador's servant, was, *That he was hired in quality of a domestick servant to him, and did what services he required of him, but because he did not say that he actually served him in the capacity he was hired in,* which the court held necessary to have been done, they discharged the rule made for shewing cause. Barnard. Rep. in B. R. 401. Mich. 4 Geo. 2. Ball v. Fitzgerald.

14. Defendant was arrested and held to special bail, and moved to be discharged on producing a certificate from the French ambassador, that he was his master of horse. It appeared that he was a trader, and such a one as a commission of bankruptcy might issue out against, and so the court discharged the rule to shew cause. Rep. of Pract. in C. B. 65. Trin. 5. Geo. 2. Martin v. Sharopin.

For more of Ambassadors in general, See Polloy, lib. 1. cap. 10. and other proper Titles.

## Amendment. [and Jeofails.]

Fol. 196.

### (A) Amendment. At Common Law.

\* Jo. 420. pl. 8. S. C. and Jones J. held, that the saying he was tried before the same justices aids not the matter, for they may be the same justices, and yet have a new commission; and takes notice that the king had certified his pleasure, that no amendment should be, and therefore especially it ought not to be in this case, and Brampton likewise was of the same opinion; but the other two justices held it amendable; & adjournatur.

[ 1. ] IF A. brings a writ of error upon an attainder of murder before the justices of assise, and assigns for error, that the record certified by the clerk of the assises is, that he was indicted before B. and C. justices of assise, &c. 18 day of March, 8 Caroli, and that he was tried before the same justices 20th day of the same month of March, this certificate of the clerk of the assises cannot be amended by making the clerk of assise to come into court to amend it according to the record before the justices of assise, it being mistaken in the transcribing, because it is error in point of fact, scilicet, whether there was a continuance between the 18th day and the 20th day, and therefore the consequence being to hang a man upon such an amendment, it being so penal, it is not to be suffered. Hill 14 Car. B. R. This was \* Sampson's case, in which the court was divided, scilicet, Brampton and Jones, that it should not be amended, and Croke and Barkley e contra. In the argument of which these books were cited, † 12 H. 7. 25. † 2 R. 3. 9. 22 Edw. 4. 12. 10 E. 4. 15. no amendment, but in several of them the parties dismissed. Co. 4. 48. 8 H. 5.

a writ of Venise facias issued to the jury in the same county to amend.]

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† Br. Indictment, pl. 32. cites S. C. but S. P. does not appear:—Br. Cause de remover plea, &c. pl. 27. cites S. C. but S. P. does not appear.

† Br. Indictment, pl. 50. cites S. C. but S. P. does not appear.—An inquisition was mentioned to be taken *ad sessionem Paris, &c. in com. sur. tent. die Martis &c. die Mercurii, &c.* but it was quashed, because, though the sessions may endure 2 or 3 days, yet the record ought to mention that the sessions were held at a certain day. 4 Rep. 48. pl. 13. Hill. 30 Eliz. Anon.

Br. Error, pl. 68. cites 7 H. 6. 28.

2. Where judgment is entered in B. R. or in C. B. otherwise than the truth is, or if tales be awarded and marked in the back of a writ or scroll, and not entered in the roll, all such things may be amended the same term, because the record is in the justices, and in their breast the same term, and not in the roll, therefore there they amend the roll, and it was said that this was not the record, but in another term the roll is the record, and so see this amendment is an amendment by the common law, and not by the statute of amendments of syllable or letter. Br. Amendment, pl. 32. cites 7 H. 6. 29.

3. It was assigned for error in assise because the roll was vicecomes South. without tittle, where it should be vicecomes South' with tittle [or dash;] Halls justice said it shall be amended by the statute, which wills, that where in the record is letter or syllable too much of



or too little, it shall be amended; But per Cheney, it shall not be amended by the statute, but shall be amended by the common law; for *always where the roll was entered contrary to the original, &c.* (as here) it shall be amended, wherefore it shall be amended, &c. Br. Amendment, pl. 34. cites 7 H. 6. 45.

4. So of *Epus* where it should be *Ep'us*, or *Dns* where it should be *D'ns*, with a tittle [or abbreviation.] Br. Amendment, pl. 34. cites 7 H. 6. 45.

5. At common law variance in any part of the *record from the original* was amendable by the common law. 8 Rep. 156. b. cites 7 H. 6. 5. a.

6. At common law the judges might amend *their judgment* as well as any other part of the record, &c. *in the same term*; for during the term the record is in the breast of the justices, and not in the roll. 8 Rep. 156. b. 157. a. cites 7 H. 6. 29. a. b. 9 E. 4. 3. b. 2 R. 3. 11. a. b.

Co. Litt. 260. a. S. P. that so it is, but does not speak of the common law.

7. But at common law the *misprision of the clerks in another term in process* was not amendable by the court; for in another term the roll is the record. 8 Rep. 157. a.

Powell J. cites this saying of Lord Coke, and says,

This must be understood of the award of the process by the court upon the roll, for the misprision of the clerk in making out a writ with a wrong teste is not in the breast of the court, and therefore that saying must be restrained to the award of the process upon the roll; for process is never any otherwise in the breast of the court than as they award it, and therefore there will be no difference as to this amendment, whether it be done in the same term or in another. There is no case of amendments at common law, where it has been extended so far as to amend process, but only the acts of the court in entering continuances. 2 Ld. Raym. Rep. 1067. Mich. 3 Annæ.

8. An *original writ* was not amendable at common law in the case of a common person; but in case of the king in *quare impedit* where the writ was *præsentare* for *præsentare* it was amended, and the defendant awarded to answer. 8 Rep. 156. b.

Br. Amendment, pl. 59. cites 40 Ass. 26. that false Latin was amended in

case of the king.—Br. False Latin, pl. 74. cites S. C. accordingly.—G. Hist. of C. B. 88. S. P. accordingly, for the court supposed the original constitution of the court was not to destroy the king's prerogative, but this constitution was found to be very inconvenient, because being tied down so strictly not to alter their records, after the first term several judgments were reversed by the misprision of their clerks in processes.

9. 8 Rep. 156. b. in Blackamore's case, cites 20 E. 4. 7. and 10 H. 7. 25. a. b. and says there was a diversity of opinions, whether there was any amendment at common law or not; but that it is without question that at common law the *want of entry of a continuance or essoin*, which was the misprision of the court itself in the form of the entry, was amendable by the court, and cites 5 E. 3. 5. 10 E. 3. 20. and 12 E. 3. Amendment 62. which books were before any statute of amendment.

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10. No amendment was at common law. Br. Amendment, pl. 74. cites 18 E. 4. 13. and 20 E. 4. 6. per Brian Ch. J.

No original writ was amendable

at common law. Arg. Ld. Raym. Rep. 565.

11. *Whatever* at common law might be amended in civil cases was at common law amendable in criminal cases, and so it is at this day;

day; resolved by Holt Ch. J. Powell and Powis J. 1 Salk. 51. pl. 14. Mich. 3 Ann. B. R. the Queen v. Tutchin.

12. Though a *misawarding of process on the roll* might be amended at common law the *same term*, because it was the act of the court; yet if any clerk at common law issued out an *erroneous process on a right award of the court*, that was never amended in any case at the common law. 1 Salk. 51. pl. 14. Mich. 3 Ann. B. R. resolved by the Ch. J. and 2 justices in the case of the Queen v. Tutchin.

13. Statutes of amendment *extend only* to pleadings of record, therefore pleadings, while *in paper*, are amendable by common law. Anciently all pleas were *ore tenus* at the bar; and then, if any error was spied in them it was presently amended. Since that custom is changed, the motion to amend, because all in paper, succeeded in the room; and it is a motion that the court cannot refuse: but they may refuse it if the party desiring it *refuse to pay costs*, or the amendment desired should amount to a *new plea*. 10 Mod. 88. Mich. 11 Ann. B. R. Rush v. Seymour.

14. At common law there was very little room for amendments, and this was from the original constitution of the courts, as it appears by Britton; for the judges were to record the parols deduced before them in judgment; and Britton says, in the person of Ed. 1. We have granted to our justices to record the pleas pleaded before them, because we will not suffer their record to be a warrant to justify their own misdoings, nor that they erase their words, nor amend them, nor record against their inrolment. G. Hist of C. B. 86. 87.

15. That part of the count which records the writ was amendable at common law, though of a subsequent term, because the recording of the writ was surplusage; and by the law which constitutes the court, they were not to record against a former, and therefore the court by that constitution was obliged to set such misprisions right. G. Hist. of C. B. 87.

## (B) Amendment, by 8 H. 6. Default of the Clerk.

Ow. 61.  
S. C. and  
upon examination it

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appeared

that the person sworn, whose name was Tippet, was summoned to appear to be of the jury, and that he inhabits in the same place where Tipper was named, and that no such man as Tipper inhabited there, and therefore it was amended.—Hob. 328. pl. 403. Pasch. 14 Jac. Badham's case, is exactly the same point and name of the juror, and seems to intend S. C. though different in time.

\* Hob. 64.  
pl. 65.  
Arundel's

[ 1. ] IF *Tippet* be returned in the *venire facias*, and in the *habeas corpora and distringas* juratores he is named *Tipper*, yet if his *true name* be *Tippet*, according to the *venire facias*, and *Tippet* is sworn, and tries the issue, it shall be amended. Trin. 39 Eliz. B. R. between Hugo and Paine, adjudged in a writ of error.]

[ 2. If a juror be sworn by a false name, yet this shall be amended, if it be deposed that he was the same man who was returned

turned upon the panel. Pasch. 40 Eliz. B. Marshal's case, adjudged. Mich. 13 Jac. B. between \* Arundel and Blanchard, adjudged, where he was called *Lisney* in the venire facias, and *Lisney* with a (t) in the jurata.]

agree with the venire facias, though the true name was *Lisney*, because they found alike.——Brownl. 174. S. C. but makes the difference between (*Lisney*) and (*John Lisney*), without inserting a (t) in either; but says, that upon the sheriff's oath that he was the man returned in the venire facias, it was amended.——G. Hist. of C. B. 134. cites S. C. and says that he is the proper *judex facti*.

[ 3. If upon the *distringas* a juror be called *Appell*, and upon the *jurata* *Ap-Bell*, this is such a variance between the names, that it cannot be intended the same man; for this is not the same name in the Welch language, where this trial was, and therefore cannot be amended by the court after the death of the sheriff. Trin. 13 Jac. B. R. between Floyd and Bethell, per curiam.]

[ 4. But if the sheriff who made the return had been living, he might have come into court and amended it. Trin. 13 Jac. B. R. per curiam agreed.]

mitted by Coke and Doderidge.

[ 5. If in the venire facias a juror be called *Samuel Hame*, and so well named in the writ of *distringas*, but in the *nomina juratorum* annexed to the *distringas* he is named *Daniel Hame*, and by this name sworn, and this appears by the record itself, and he with the other jurors at the *nisi prius* gives a verdict for the plaintiff, though he be misnamed in the christian name, and so not within the statute of jeofails of 21 Jac. 1. yet when upon the examination of the juror himself it appeared that he was the person returned, and that there is no other of that name within the parish, and that his name was Samuel Hame, and that he appeared, supposing himself to be called Samuel by the cryer, there being a great noise at the time he was sworn, and gave a verdict; and upon examination of the sheriff and his clerk, it did appear he had the *distringas* before him, when he wrote the *nomina juratorum*, and mistook *Daniel* for *Samuel*, this shall be amended, because the venire and *distringas* were well, and this only the mistake of the clerk. Mich. 15 Car. B. R. between \* Rowe and Bond, per curiam. Adjudged upon good advice; entered Mich. 15 Car. R.

† Codwell's case, where it is held, if the venire facias be well, and the misnomer in the christian name in the *distringas* or *postea*, it is amendable.]

taken; and judgment was affirmed.——Jo. 448. pl. 13. Bond v. Davis S. C. and judgment affirmed.

In the venire facias a juror was returned by the name of George Tompson, and in the *distringas* he was named Gregory Tompson, and sworn; the verdict was held void, and the court took the difference between a mistake in the name of baptism and in the surname; for a man may have but one name of baptism, but may have two surnames. Cro. E. 57. pl. 7. Pasch. 29 Eliz. B. R. in case of Disply v. Sprat.——Cro. E. 222. pl. 1. Pasch. 33 Eliz. B. R. in case of Farmer v. Dorrington S. P. as to the christian name was agreed, and cited the case above by the name of Douby v. Willot.——Ibid. 256. pl. 29. Mich. 33 & 34 Eliz. B. R. Hallet v. Payne S. P.——Ibid. 866. pl. 47. Mich. 43 & 44 Eliz. S. P. Cogb v. Carew.——So of Constantinus in the venire facias and Constantius in the *distringas*, there cannot be any amendment. Cro. J. 116. pl. 5. Pasch. 4 Jac. B. R. Blunt and Farly v. Snedston.

——If the names of the jury be wrong in the body of the *distringas* in the panel returned, or in

the panel of the jury sworn, yet if it can be proved to be the same man that was intended to be returned in the venire, having there his right christian name, he is the proper *judex facti*, and it may be amended by the statute. *Gilb. Hist. of C. B.* 134.

† *Cro. E.* 319. pl. 7. *Codwell v. Parker* S. C. — *Cro. C.* 203. pl. 6. cites S. C. and says the record of it was shewn in court; but [the book says] Note the misprision was in the return of the venire facias, which was the first process and return, but where it is in the second, which ought to be guided by the former process, as in the principal case, the court doubted thereof; & adjournatur. *Mich.* 6 *Car. B. R.* *Downs v. Winterflood*.

Where instead of *Gregory* in the ven. fac. the clerk of the assise returned *George*, which was entered upon the roll, and certified on the record in B. R. The court said there need be no amendment, because it was only in the *tales de circumstantibus*, and not in the principal panel. *Winch.* 66. *Trin.* 21 *Jac.* 1. *C. B.* *Harvey v. the Hundred of Chelsam*. — *Cro. J.* 677. pl. 13. *Harvey v. Chelmsford Hundred*, S. C. but S. P. does not appear. — 2 *Roll. Rep.* 394. S. C. but S. P. does not appear.

*Jo.* 448. in pl. 13. *Bond v. Davys*, this case was cited by *Jones J.* and the record was brought into court, and was 40 & 41

[ 6. [So] If in the venire facias a juror be called *Pearse Thomas*, and so in the habeas corpora, but in the nomina jurator annexed to the habeas corpora he is called *Peeze Thomas*, and sworn by this name, yet if upon examination it appears to the court that he was the same person returned, this shall be amended. *Trin.* 42 *Eliz.* B. R. *Rot.* 1092. And this being assigned for error, this record was shewn in court upon the debate of the case before between *Rowe and Bond*, and the judgment was affirmed, and this matter amended in the record.]

*Eliz.* The case of *Payne v. Heaton*.

\* *Palm.* 336. *Ramsay v. Bradford*, S. C. The ven. facias was *Harnthorne*, and the habeas corpora was of *Hampthorpe*, and judgment affirmed. — *Cro. J.* 653. pl. 2. *Bradford v. Ramsay*, S. C. and judgment affirmed.

[ 7. If in the venire facias a juror be called *Will. Browne de Hamthorne*, and in the distringas or habeas corpora *Will. Browne de Hampthorpe*, who is sworn, yet this is good, because it may well be that he was of one place at the return of the venire facias, and of another place at the return of the distringas or habeas corpora, and it may be that the same place is known by one name as well as the other, and by the common law the place of the habitation of a juror was not of necessity to be expressed, nor was in use till the statute inflicted a penalty upon the sheriff for not doing thereof; but it is a good panel though no place be expressed. *Hill.* 20 *Jac.* B. R. between \* *Radford and Ramsay*, adjudged, the which intratur and then a record was shewn 14 *Jac.* B. R.

between † *Stanhopp and Stanhopp*, *Rot.* 612. where a juror was named in the venire facias *John Collington de Gartlington*, and in the habeas corpora *John Collington de Cortlington*, and he was sworn, and yet adjudged good in a writ of error for the cause afore said.]

† *Cro. J.* 457. pl. 1. *Hill.* 15 *Jac.* B. R. S. C. and judgment affirmed. — *Palm.* 337. S. C. cited as resolved that it was not error. — 2 *Roll. Rep.* 111. S. C. cited, and S. P. resolved accordingly, where the venire facias was J. S. of *Inslow* with a (w,) and the distringas was J. S. of *Inslon* with a (n,) if it appears by examination that it was the same person that was sworn, and gave his verdict, it should be amended. *Trin.* 17 *Jac.* B. R. *Anon.*

In the venire facias a juror was returned by the name of J. S. of *Abbotson*, and in the distringas he was returned by the name of J. S. of *Abbatson*, and it was awarded to be amended. *Cro. E.* 254. pl. 39. *Mich.* 33 & 34 *Eliz.* B. R. *Cotton's case*. — So in the ven. facias a juror was named of *Hurst*, and in the distringas was named of *Hurft*, this was awarded good, and the plaintiff had judgment. *Ibid.* cites it as the same term, *Mortimer v. Oger*.

*Jo.* 315. pl. 2. *Brewood v. Drake*, *Pasch.* 9 *Car. B. R.*

[ 8. In a writ of dower, if in the venire facias a juror be called *Thomas Andrews*, and in the habeas corpora he is called so also, but in the panel of the habeas corpora he is called *Thomas Andrej*, and

and by this name sworn, yet if upon the *examination* of the Sheriff it appears that this was the same man, it shall be amended; for it \* is *all one in sound*. Pasch. 8 Car. B. R. between Prewel and Drake, in a writ of error upon a judgment in banco adjudged, this being assigned for error.]

Drake, seems to be S. C. but S. P. does not appear. —Cro. C. 300. pl. 3. Pruet v. ot appear.

[ 9. If Robert Moore be returned upon the *venire facias* and *distringas*, but in the panel before the justices of nisi prius by mistake he is named Robert Mawre, and so upon the *postea*, yet if it appears upon examination that his *right name was Moore*, so that he was well named in the *venire facias*, this shall be amended; but otherwise it had been if he had been misnamed in the *venire facias*. Co. 5. Earl of Rutland 42. resolved.]

*misnamed in the pannel of the venire facias, though he be well named in all the process subsequent, it cannot be amended.* 5 Rep. 42. b. says it was so adjudged Mich. 35 & 36 Eliz. B. R. in Cowell's case.

[ 10. If in the pannel of the *venire facias* a juror be named \* Paulus Chele, and in the *distringas* & *postea* Paulus Chele, this shall not be amended upon examination, because he was *misnamed in the venire facias*, which was the ground and foundation of all; but otherwise it had been if he had been *well named in the panel upon the venire facias and misnamed upon the distringas, or in the postea*, for there upon examination it should be amended. Co. 5. 42. b. † Codwell's case, resolved.]

—Goldsb. 184. pl. 124. Hill. 43 Eliz. Brewster v. Bewty, S. P. — In the *venire facias* a juror was named Jeronimus, with a single (m) and in the *postea* Jeronimms (with an (m) too much.) The *venire* cannot be amended; but Coke said, it shall be taken for Jeronimus without any amendment. Noy 140. Sommers's case. — The *venire facias* was *Hicronymus* and the *distringas* was *Jeremias*; and therefore judgment was arrested. Mo. 762. pl. 1059. Trin. 3 Jac. B. R. Anon. — See pl. 5. and the notes there.

[ 11. If upon the note of a fine the proclamations are well entered, but upon the foot of the fine they are entered, that \* 13 *proclamatio tenta tali & term. 13 proclamatio*, where it ought to have been 14 *proclamatio*, this shall be amended. Pasch. 8 Jac. B. per curiam.]

—See the division of amendment of fines and common recoveries, infra.

[ 12. If the *imparlance roll* in bank, and the *plea roll* vary in matter of substance, and the *plea roll* is well, but the defect is in the *imparlance roll*, although the *imparlance* being the warrant for the *plea roll* it cannot be amended by the *plea roll*, yet if it appears upon examination that the *plaintiff's attorney* gave right instructions to the clerk it shall be amended. Hobart's Reports, case 310. between Lees and Arrowsmith adjudged.]

Arrowsmith's case, S. C. says that it was amended, but makes no mention of the examination of the attorney. — See (F) pl. 19. S. P.

[ 13. If a note be delivered to the *curfitor*, and the *plaintiff* A. B. is named knight, but the *curfitor* draws it, and names him A. B. gentleman, and in all the process after he is also named gentleman, yet upon examination of the *curfitor* of the truth thereof, this shall be



of *vicar iam*, and because it appeared to the court by the cur-  
fitor's book  
[\*295] Mich. 8 Jac. B. between Sir Lenthrop Franke and Sir John Millecent, adjudged, and there cited also the same term Perseval Hart's case adjudged. Hobart's Reports 164. between \* Brickhead and the Bishop of York, adjudged accordingly, *viccar pro vicar*. See same case Mich. 8 Jac. B. in Co. 8. 156. Blackamore's case. See Hob. Rep. 171. between || Oglethorpe and Mawd.]

that his in-  
structions were vicariam, he was ordered to amend it in open court.—Hob. 197. pl. 150. S. C. but S. P. does not appear —S. C. cited Lev. 2.

|| The writ of assise was *Ad faciendum recognitionem illum*, whereas it should have been (*illam*.) The curfitor made oath, that a note by him produced (which was right) was the original note whereby the writ was made; but because in Pennington's case, 11 H. 7. the like fault in the writ would not be amended, the court would be advised. Hob. 128. pl. 162. S. C.—Mo. 866. pl. 1196. is a short note of S. C.—S. C. cited Lev. 2.

Hob. 249. [ 14. If an original writ of *ejectione firmæ* be that J. S. *divisit* to him such land, &c. for years, &c. where it should be *dimisit*, though pl. 326. S. C. says in general that the word was amended.—Brownl. 130. S. C. says the curfitor  
[ 14. If an original writ of *ejectione firmæ* be that J. S. *divisit* to him such land, &c. for years, &c. where it should be *dimisit*, though the word (*divisit*) be a Latin word, for it signifies to divide, yet because it appears to be the default of the *curfitor*, he may be suffered to come into court and amend it, and he being decrepit and not able to come his servant may do it. Pasch. 17 Jac. B. between Marsh and Sparry adjudged. Hobart's Reports, case 324. same case.]

was ordered to amend it.—So in ejectment where the record of *nisi prius* was 6 acres *pur-  
turæ* with an (r) instead of (s) it was ruled per cur. that it should be amended and made *pasturæ* according to the record, it being but the misprision of the clerk. Cro. E. 466. (bis.) pl. 13. Pasch. 38 Eliz. B. R. Bedel v. Wingfield.

Action upon the case upon a promise in consideration the plaintiff would *afferere* instead of *afferre*, &c. It was moved in arrest of judgment, and the court gave directions to see if it was right as to the roll. And per Twisd. *distinctionem* instead of *distructionem*, and *vaccaria* instead of *vicaria*, could not be helped. 1 Mod. 15. Mich. 21 Car. 2. Fettiplace's case.

Hob. 129. [ 15. If G. G. Esq; is bound in a statute merchant, and after is made knight and baronet, and after a certificate is made by the mayor into the Chancery, and upon this a *capias* is awarded against G. G. Esq; as he is named in the statute; and this is returned in banco, and upon this several extents awarded, which were executed and returned, where the *capias* ought to have been against G. G. militem & baronettum, qui per nomen G. G. armigerum recognovit, &c. this cannot be amended because it is not the default of the clerk, because this was matter which ought to come from the information of the party. Hobart's Reports 173. Sir G. Grisley's case, adjudged.]  
pl. 168. S. C. accordingly. —So where a baronet was sued by the name of Sir W. H. knight and baronet, whereas he never was knighted; the court held it not amendable. Vent. 154. Mich. 23 Car. 2. B. R. Sir William Hicks's case —2 Keb. 824. pl. 45. S. C. adjudged for the defendant.

In eject-  
ment the  
paper book  
was right  
(viz.) *acram  
terræ*, but  
the declara-  
tion upon the  
file was ill,  
viz. *clausum  
terræ*; this  
[ 16. In an action upon the case upon a promise for wares sold, if the plaintiff declares that he sold *tres virgatas Anglice silk*, and omits the word *serici*, and after a verdict for the plaintiff upon examination of the clerk that the word (*serici*) was inserted in the paper draught, and so the party not deceived, it was amended by the paper draught, for this was merely the default of the clerk. Mich. 5 Car. B. R. between Young and Skipwith, per curiam, adjudged.]

was amended by the paper-book, and this difference was taken, that where there is a paper-book in the office which is right, all shall be amended thereby, but if there be no paper-book, and the



Bill upon the file be ill, there shall be no amendment. Palm. 404. Pasch. 1 Car. B. R. Todman v. Ward.—And at another day the court agreed that the amendment should be according to the paper-book which was with the plaintiff's attorney, (there being no declaration with the clerk of the papers) and thereupon the attornies on both sides were apposed, (the paper-book being now right) whether it was amended after the defendant's attorney set his hand to it, who said that it was not, whereupon it was adjudged to be amended. Palm. 405. S. C.—Lat. 58. S. C. but not so full, but says it was amended.—D. 260. b. Marg. pl. 24. cites S. C. says the difference taken was, that it should be amended by the paper-book in the office of the clerk, but not if it was another paper-book, and the bill upon the file ill.—Lat. 86. Triq. 2 Car. Anon. S. P. and seems to be S. C. but says, that afterwards per cur. the amendment shall be by the paper-book, which was with the plaintiff's attorney, because there was no declaration with the clerk of the papers; and thereupon the attornies both of plaintiff and defendant were examined in court, whether it was amended after the defendant's attorney had set his hand to it, and because they said that it was not, judgment was that it be amended. After the first term you may amend the imparlance roll by the office paper-book, because that is instructions to the prothonotary to enter up the imparlance roll; and therefore that is equally amendable as the original is by the instructions given the curfitor; but this is done on the oath of the defendant's attorney, as in Blackmore's case; [and in] \* Chamberlain's case, to amend the writ, oath must be made that the paper-book has not been altered since the defendant's attorney has put his hand to it, which he always does when he joins in issue or demurrer, and this amendment seems to be reasonable, because the defendant has not misled or deceived. In B. R. they will amend both the bill and the roll of the office paper-book, because this is instruction for making them both; but they cannot amend from any other paper-book, because such book is not instructions left in the office to make up the roll and bill. But where there is no office-book, as where the general issue is pleaded, it seems they should amend either the bill or the roll, by the declaration of which they gave the defendant a copy, because such declaration is the only instruction to the clerk of the office to enter. G. Hist. of C. B. 115.—

\* See (F) pl. 16. S. C. in the notes there.

[ 17. If in a writ of debt against an executor upon an obligation it be laid in the writ to be made in the county of the city of York, and in the imparlance roll the margin is *Civit' Eborum*, but the declaration is that the testator apud villam novi castri super Tinam concessit se teneri, &c. But in the plea \* roll it was well, scilicet, that the testator concessit se teneri apud civitatem Eborum, the imparlance roll shall not be amended according to the original writ. Hobart's Reports case 130. between Fetherstonhaugh and Topfal, per curiam.]

Hob. 251. pl. 332. Hill. 13 Jac. S. C. — Brownl. 66. \* Fol. 99. Fetherston v. Tapfal, S. C. accordingly.—

The imparlance roll cannot be amended by the original writ, because the original writ is the authority on which the court proceeds, which the plaintiff must prosecute; for otherwise he does not proceed in that cause. If the count varies in form, the defendant may plead it in abatement, for he has abated his own writ by prosecuting it in a different manner; but if it varies in substance, the defendant may move it in arrest of judgment, because he has no authority to proceed, having prosecuted a different matter from that which the writ has given authority to the court to take cognizance of. G. Hist. of C. B. 116.

[ 18. If an *habeas corpus* be to have the jury *summonitos in curia nuper reginæ*, and after the *distringas* is to *distrain the jury summonitos in curia nostra*, and after judgment is given, this is error not amendable, for the jury cannot be summoned upon any other writ but the *venire facias*, and afterwards they are attached and distrained and not summoned. Tr. 3 Jac. B. R. 7. between Knowles and Burtenshaw, adjudged.]

Cro. J. 89. pl. 15. Knowles v. Beckinslow, S. C. The *venire facias* was returned in the queen's time, and

after in King James's time, an hab. corp. was awarded with a tales, reciting *Quod habeat corpora juratorum summonit' in curia nuper reginæ*, and because the jurors were never summoned, for the *ven. fa.* was the first process, which is not any summons, it was held to be error, and the judgment reversed, though the error was in judicial process, and it is not aided by the stat. 32 H. 8. nor 18 Eliz. For the one process ought to warrant the other, which is not done here; for it cannot warrant this tales.—D. 105. b. Marg. pl. 16. cites C. S. but seems not very clear. —S. C. cited Cro. J. 161. and ibid 162. pl. 16. the same was agreed per cur. to be good law; for if the hab. corp. is of jurors summoned in *curia nostra* & *quod ad illos apponatur decem tales*,

tales, the sheriff had no authority apponere decem tales, but to the jurors first summoned in curia regis, and there were not any such; so as what he did was without warrant. But where in the principal case, which was Pasch. 5 Jac. B. R. Comyn v. Kyneto, a venire facias issued in the reign of queen Eliz. and a distringas thereupon, and an alias distringas issued in the time of king James, Quod distringat juratores nuper summonitos in curia nostra, whereas it ought to have been in cur. nuper reginæ, and a trial was had by the same jurors, Popham and 3 other judges, contra Williams, held that the writ was amendable, and judgment was affirmed.—Jenk. 313. pl. 100. S. C. adjudged good and amendable, and affirmed in error.—In the case above was cited Goodwin's case, as adjudged in the Exchequer, where a ven. fa. was awarded in the queen's time, and a *distringas with nisi prius* in K. James I.'s time, reciting Quod distringat juratores nuper summonitos in curia nostra, whereas no summons had been but in the queen's court only, and trial thereupon, and judgment, but reversed for this cause in error. And four justices held this case to be good law, but that it differs from the said case of Comyns v. Kyneto; for this case is of a distringas with nisi prius, which is a *special authority to the justice*, who being justices by that special commission, and not having authority to take any jury but such as was summoned before in curia regis, there being no such, the trial by another jury was erroneous; whereas in the said case of Comyns v. Kyneto, the justices of Durham (where the judgment was given) are original judges of the whole record, and had it before them at the time of the trial, and the

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roll being good is a sufficient warrant to them for the trial, and the writ being variant, it might be amended there, and so may well be amended here; and though the trial is there by part of the tales, yet that tales was awarded, and returned by command of that court and view of the roll, and not upon the writ, and therefore is good enough.

Yelv. 30.  
S. C. but  
S. P. does  
not appear.

—Yelv.  
59. S. C.  
but S. P.  
does not ap-  
pear.—

Cro. J. 25.  
pl. 2. S. C.

but S. P. does not appear.—Noy. 41. S. C. but S. P. does not appear.—Jenk. 248: pl. 39. S. C. but S. P. does not appear.—S. C. & S. P. cited Arg. 2 Ld. Raym. Rep. 1058. and admitted by Holt Ch. J. because it was a bad writ, and the fault was in the body of the writ.

[ 19. But if *J. S.* is bail for *J. D.* in an action, and he sues on *audita querela*, and upon this a *scire facias* which recites the *audita querela*, and the *capias* against the principal, and the return thereof, which *capias* was awarded in the time of queen Elizabeth, and the *scire facias* recites it to be *per breve dominæ reginæ Angliæ vicecomiti nostro de S. directum*, which is to the sheriff of the king who is dead; this shall be amended; for it is the default of the clerk. Pasch. 3 Jac. B. R. between Barns and Worlich, adjudged.]

[ 20. If an executor brings an action of debt upon an obligation against *J. Lord Marquis of Winchester*, and charges him as son and heir to his father *W. Lord Marquis*, and makes the usual declaration against him, and in the end thereof shews that because the debt was not paid by *J. the father* nor by *J. the son*, he hath brought this action, where it ought to be by *W. the father*, &c. and after judgment was given for the plaintiff, and error brought, this shall be amended. H. 38 Eliz. B. R. between Fitch and the Lord Marquis of Winchester, adjudged.]

Cro. E. 204.  
pl. 38. S. C.  
that after  
verdict it  
was held  
good not-  
withstand-

ing this variance; for it is as if there was no original which is helped by the statute; and if it be said a variance, it may be amended; and the plaintiff had judgment.

[ 21. In a *replevin* by original, if the defendant in the writ is named *Whorewood* with a (W.) and in the count *Horewood* without a (W.) this shall be amended after verdict, for this is *all one in sound*. (M.) 32. 33 Eliz. B. R. between Bradly and Whorewood, adjudged; but it does not appear that it was amended.]

If a decla-  
ration be  
against *J. B.*  
and he im-  
parts by the  
name of

[ 22. In an action against *Henry B.* if the defendant imports by the name of *Richard*, but in the rest of the pleadings he is named by his true name, this shall be amended. Hill. 43 Eliz. B. R. Drury's case, adjudged.]

*R. B.* but pleads by the right name *J. B.* this is no material fault, because it is only a *continuance*

nance from one term to another; and by pleading by the right name, he acknowledged he im-  
 parled by a wrong name. G. Hist. of C. B. 117.

[23. But otherwise it had been if his name had been mistaken in the beginning of the plea; for then it had been matter of substance. Hill. 43 Eliz. B. R.] See Cro. J. 13. pl. 17. Pasch. 1 Jac. B. R. Philips v. Hughes, S. P. and held not amendable.—Yelv. 38. Hughes v. Philips, S. C.

[24. In an action, if in some part of the record the defendant be named Segear, and in another part of the record Segar, this shall be amended, for these are *idem sonantia*. Mich. 14 Jac. in Camera Scaccarii, adjudged.] In the distringas the defendant was named (Shacraft) but in the

venire facias, and all the other proceedings, he was truly named [Shacraft] and it was ordered to be amended; for per Wray, the difference here is little, and in some countries (a) is sounded for (o) and so is not material. Cro. E. 258. pl. 38. Mich. 33 & 34 Eliz. B. R. Denner v. Shacraft.

Venire facias was Pousanby, and so was the distringas, but in the names of the jurors returned it was Panjanby, who was sworn, and therefore it was objected to be another name than was returned, sed non allocatur; for it is not another name, the difference being only in the surname, and there is small difference in the sound, especially in the country where A. is many times sounded as O. or U. and so no material difference. Cro. J. 353, 354. Mich. 12 Jac. B. R. Musgrave v. Wharton.

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[25. In an action upon the case by A. if the plaintiff declares that B. the defendant imposed the crime of felony to the plaintiff for stealing a mare ipsius A. who was the plaintiff, but he intended the defendant, after verdict for the plaintiff, yet this shall not be amended, because this is \* matter of fact, for it may be true. Hill. 14 Car. B. R. between Miller and adjudged per curiam, and after, the same term, the judgment was reversed for this cause in Camera Scaccarii in a writ of error.] \* The return of a habeas corpus of one committed shewed no cause of the commitment, and therefore was held

insufficient; and on motion to amend it Doderidge J. said, that matter of form merely in a return is amendable, but not matter of fact which goes in justification of the imprisonment and fine. 2 Bulst. 259. Mich. 12 Jac. Alphonso v. the College of Physicians.

[26. If a distringas issues apponere thereto decem tales, this is error not amendable, for they cannot be apposed but to the first jury summoned by the venire facias. Trin. 3 Jac. B. R. between Knowles and Burtenshaw, adjudged.] Cro. J. 89. pl. 15. Knowles v. Beckinshaw, S. C. but S. P.

does not appear.—Cro. J. 161, 162. pl. 16. S. C. cited Arg. and agreed per Cur. to be good law. —See pl. 18. and the notes there.

[27. In an *ejectione firmæ* by John Weeks plaintiff, against Thomas Veale defendant, if the defendant pleads Not Guilty, and prædictus Thomas (\*) similiter, where it should be & prædictus Joannes similiter, yet this shall be amended. Mich. 10 Car. B. R. between Weeks and Veale, adjudged per curiam, this being moved in arrest of judgment after a verdict for the plaintiff, where the course of the King's Bench is not to enter any continuances till issue, and after before judgment to enter all the continuances upon the roll, though no continuance be entred after issue before judgment, but a judgment is entred without the entry of them, yet this shall be amended.] Fol. 200. In debt in an inferior court by John Vita against James Vita, the defendant pleaded Nil debet & de-

hoc ponit  
se super  
Patriam,

amended, for it is the default of the clerk. Tr. 16 Jac. B. Sir George Trencher's case, adjudged.]

and issue was *Et prædictus Jacobus similiter*, instead of *prædict. Johannes*. Judgment was given for the plaintiff, and this assigned for error; and all the court held it amendable by 8 H. 6. and judgment affirmed. Cro. E. 435. pl. 47. Mich. 37 & 38 Eliz. B. R. John Vita v. James Vita.

In assumpsit found for the plaintiff it was moved in stay of judgment, because the record was entered, *Et prædict. Tho. Venit per astornatum suum, Et prædict. J. per astornatum suum Et prædictus Thomas defendit, &c et prædict. Thomas similiter*, and so as John never pleaded, and so no issue was joined. It was holden by the court, that it was but the misprision of the clerk, and well amendable after verdict; for it shall be intended the defendant's plea, and only the misentry of the clerk, and so it was amended, and judgment for the plaintiff. Cro. E. 904. pl. 7. Mich. 44 & 45 Eliz. B. R. Russell v. Grange.

In debt against John M. as executor of J. S. he pleaded *Plene administravit*, the plaintiff replied, *Et prædictus Wilhelmus dicit quod prædictus Wilhelmus habet bonas, &c.* and so puts William for John, and issue was joined, *et prædictus Johannes similiter*, after verdict for the plaintiff all the court held it only the default of the clerk, and awarded it to be amended, and judgment for the plaintiff. Cro. J. 67. pl. 7. Pasch. 3 Jac. B. R. Birton v. Mandell.—Yelv. 65. Birket v. Manning, S. C. accordingly.—Brownl. 87. S. C. accordingly.

The condition of a bond was to save harmless from payment to M. S. The issue joined was *Et prædict. M. S. similiter*, instead of *Et prædict. quer. similiter*. Per cur. This being after verdict, shall be amended. Palm. 524. Pasch. 4 Car. 2. B. R. Rigg v. Wharton.

If on an issue tendered by the plaintiff the defendant joins the *similiter* by the plaintiff's name, or the plaintiff joins the *similiter* by the defendant's name to an issue tendered by the defendant, this shall be amended, there being a negative and affirmative before between the plaintiff and defendant, which is the pattern from whence the joining of the issue is to be taken, there is a sufficient copy from whence this may be amended, it being a plain mistake, from the nature of the thing, of one man's name for another. G. Hist. of C. B. 129.

[ 299 ] In error to reverse a judgment, the error assigned was, that there was *no issue joined*; for it was *Et prædictus Josephus similiter*, instead of *prædictus Robertus*; and of the same opinion was Roll. Ch. J. and that it could not be amended. Sty. 113. Trin. 24 Car. Pitcher v. Symmons.

[ 28. In trespass for an assault, battery, and imprisonment, *vi Et armis*, if the defendant *quoad vi Et armis* pleads *Quod ipse est inde culpabilis*, where it ought to be *non culpabilis*, and *quoad residuum transgressionis*, he pleads a special plea after judgment as a mistake, it shall be amended; for this is but *matter of form*, and the default of the clerk. Trin. 7 Jac. Scaccario, between Nois and Jackman, per curiam.]

[ 29. In trespass for a trespass done ultimo die Junii, 1 Jac. if the plaintiff in the replication says *Quod prædicto ultimo die Junii anno 5 Jac.* where it ought to be *primo* according to the declaration, after verdict, and judgment for the plaintiff, it shall be amended; for *prædicto ultimo die Junii* had been sufficient without expressing the year, and then the false *expressing what was not necessary* shall not vitiate the pleading. Trin. 7 Jac. Scaccario. Louworth's case.]

In debt  
against an  
administra-  
tor, the de-  
fendant  
pleaded  
Fully admi-  
nistered.  
Plaintiff re-  
plied that  
he ought  
not to be  
barred by  
any thing  
said per prædict.

[ 30. In trespass, if the defendant pleads his freehold, to which the plaintiff replies and traverses it *& hoc petit quod inquiretur per patriam*, and it is entered *Et querens similiter*, where it should be *& defendens similiter*, and so no issue joined, this shall be amended, for this was the default of the clerk. Mich. 9 Car. B. R. between Brown and Cleave, adjudged after a verdict. 10 H. 7. 23. b. several cases there cited accordingly, 11 H. 7. \* 2. D. 9 Eliz. 260, 261. adjudged. Co. 8. Blackmore 161. b. where it was *Et prædict. similiter*, omitting the Christian name of the party who joined the issue.]

*Willielmum* (the defendant;) for he said that *prædictus Johannes habet Et di. impe-*  
trationis

*trationis, &c. habuit diversa bona, &c. & hoc petit, &c.* This shall be amended; for it is only the default of the clerk; per curiam. Yelv. 65. Trin. 3 Jac. B. R. Birket v. Manning.

\* See (D) pl. 9. and the notes there.

[31. In an action, if the *venire facias* be *Vicecomiti London salutem, &c. præcipimus tibi quod, &c.* where it *should be* præcipimus *vobis*; after verdict this shall be amended, for it is the default of the clerk. Mich. 38, 39 Eliz. B. R. Rot. 211. between During and Retrel, per curiam. Hill. 39 Eliz. B. R. adjudged.]

Ow. 62.  
During v.  
Kettle, S. C.  
and the  
writ was  
amended;  
for it being

as it were a judicial writ, it ought to ensue the other proceedings, and it was held amendable. —Cro. E. 543 pl. 11. Durning v. Kettle, S. C. and because it was a judicial writ, it was ordered to be amended, and the plaintiff had judgment. —Noy 61. S. C. accordingly. —S. P. Comyns's Rep. 580. 581. pl. 252. Trin. 11 Geo. 2. Anon.

The writ of inquiry of damages directed to the sheriff of London was *Quod inquiret*, where it should be *inquirant*, there being 2 sheriffs; but it was ordered to be amended, it being only the default of the clerk. Cro. E. 677. pl. 6. and 709. pl. 31. Trin. and Mich. 41 Eliz. B. R. Lewson v. Riddleston. —So where the writ directed to him was *Et quod habeat*, where it should be *habeatis*, it was amended. Cro. E. 618. pl. 5. Mich. 40 & 41 Eliz. B. R. Berry v. Lane.

[32. If a *venire facias* be, & *habeas ibi hoc breve*, without these words *nomina juratorum*, which ought to be in of necessity, for else otherwise the court cannot know who are the jurors, nor whom to demand to be sworn, yet after verdict it shall be amended, this being a *judicial writ*. Mich. 32, 33 Eliz. B. R. Taylor's case, per curiam.]

[33. If a *venire facias* be dated 7 Julii, and made returnable 6 Julii, a day before the date of the writ, this is not amendable after verdict. Mich. 32, 33 Eliz. B. R. between Bennet and Bladish, per curiam.]

Cro. E. 203.  
pl. 35. Mich.  
32 & 33  
Eliz. B. R.  
Gunnel v.  
Bradish S. P.

and seems to be S. C. and because this was a judicial writ, and may be returnable de die in diem, it was held it may be well amended. Cro. E. 203. pl. 35. Mich. 32 & 33 Eliz. B. R. Gunnel v. Bradish. —Cro. J. 162. in pl. 16. Tanfield J. cited S. C. where a *venire facias* bore teste out of term, and this being assigned for error it was amended and made to accord with the roll, and the judgment was affirmed. —See Grey v. Willoughby S. P.

A record was of Trinity term and an award upon the roll to try the issue returnable such a day. It was assigned for error, that the *venire* bore teste before issue joined, and where the award upon the roll is wrong, the statute of Jeofails will not extend to it. Powel J. said, the stat. of jeofails will not help the erroneous award of the court. This was a writ of error, and error assigned was, That the record was of Trinity term, and the *venire* was awarded returnable *crastino Trin'*, which was before the term; now this being a wrong award of the court, it must be intended returnable the year after, which is an erroneous award of the court, and then there is nothing to award the writ by, the roll being wrong. The court seemed to be of opinion that this was error, and not helped by the statutes of jeofails. Sed adjournatur. 11 Mod. 86. Trin. 5 Ann. B. R. Ld. Kingale v. Compton.

[ 300 ]

[34. If a writ of entry dated 14 Februarii be returnable *crastino Purificationis*, so that the teste is after the return, it is not amendable. Pasch. 2. 3. M. 129. 62. adjudged.]

[35. If a *venire facias* be awarded upon the roll to be returnable *octabis Trinitatis*, and the writ is made returnable 6 days after, scilicet, a day out of term, but the *distringas* is well without any fault, and after the jury impanelled find for the plaintiff; this writ of *venire facias* shall be amended by the roll, for it was the default of the clerk only, for the roll is the warrant of the writ. Trin. 39 Eliz. B. R. between Chaundel and Grills, adjudged in a writ of error.]

Ow. 62.  
Chandser v.  
Grills, S. C.  
and judg-  
ment af-  
firmed, for  
this is aided  
by the sta-  
tute. —  
*Venire fa-  
cias* bore

teste in December, which was out of term, but returnable in the next term. The court thought this no error, but only a misconceiving of process, and helped by the statute of jeofails after verdict.

Mo.



Mo. 465. pl. 657. Pasch. 37 Eliz. B. R. Grey v. Willoughby.—Cro. E. 467. (bis) pl. 24. Willoughby v. Grey, accordingly.—Ow. 59. S. C. and it seemed to the court good enough; for though the venire facias was not good, yet if the distringas had a certain return and place therein, and the jury appeared and gave their verdict, so that a verdict was had, the statute will aid the other defects, as in the case adjudged between MARSH AND BULFORD, where the venire bore teste out of term.—Noy 57. S. C. and the diversity is between original and judicial writs, and judgment was affirmed.

[ 36. So if the award of a venire facias upon the roll be well  
Fol. 201. and the writ of venire facias wrong, yet this shall be amended by  
the roll, the roll being the warrant of the writ, which is the act of  
the court, and the default is only the mistake of the clerk. Mich.  
Ow. 62. 38, 39 Eliz. in Camera Scaccarii, between Thorp and Fulshaw,  
cites Thorne v. Fulshaw, adjudged in a writ of error. Cited Trin. 39 Eliz. B. R.]  
S. C. accord-

ingly in the Exchequer-chamber, but says, that if the roll were naught, then it is erroneous, because the venire facias is without warrant, and no record to uphold it, and that so it was held in the case of Hungerford v. Besie.—S. C. of Thorp v. Fulshaw, cited by Powys J. Mich. 3 Ann. 2 Ld. Raym. Rep. 1064.

Yelv. 211. [ 37. If the writ of venire facias out of the king's bench be Venire  
S. C. facias 12 liberos & legales homines coram nobis apud Westmonaster-  
Cro. J. 254. rium ubicunque fuerimus in Anglia, but the roll is well, scilicet,  
pl. 10. Odell without the words apud Westmonasterium, this being in B. R.  
v. Moreton, the writ shall be amended by the roll, for this is but matter of  
S. C. form, Trin. 11 Jac. B. R. between Orde and Mooreton, ad-  
Hob. 138. judged.]  
pl. 189. S. C. —Jenk.  
306. pl. 81.

S. C. but in neither of the above books does S. P. appear.—Bulst. 129. S. C. and S. P. agreed accordingly.—Brownl. 150. Meerton v. Orib, S. C. & S. P. held that it was only the fault of the writer, and should be amended.

[ 301 ] 38. In formedon the writ was, And that after the death of the donees, and John son of the donees, to the demandant as coſin and heir of John descend', &c. Upon which was shewn to the court a titling made by the demandant to the clerk of the Chancery, by which John was made son and heir to the donees, &c, and prayed that the writ may be amended, and the court took order that the clerk should be examined, and if the default should be found to be in the clerk, the writ should be amended. Thel. Dig. 225. lib. 16. cap. 6. f. 22. cites Mich. 38 H. 6. 4. and that so agrees 22 E. 4. 47.

39. In debt, if the clerk of the Chancery had had the obligation with him at the making of the writ, it is amendable if there be variance. But if the clerk does not give any addition to the defendant, it is not amendable. Thel. Dig. 225. lib. 16. cap. 6. f. 23. cites Pasch. 8 E. 4. 4. and 22 E. 4. 21. and 11 E. 4. 2.

40. If an original writ wants a legal form, this being the ignorance of the clerk, it is not amendable by the statute 8 H. 6. cap. 12. and upon this reason it has often been adjudged since this statute, that false Latin in an original shall not be amended, as Habeas ibi hoc breve for hoc breve. 8 Rep. 159. b. cites 9 H. 7. 16. b.

Br. False Latin, pl. 78. cites 9 H. 7. 16. S. C. and S. P. by Visitor; be-

cause he may have a new writ; but that otherwise it is in false Latin in an obligation, record or plea, because he cannot have a new obligation, record nor plea.—Br. Amendment, pl. 62. cites S. C.



41. M. & Ux. brought *debt* against C. and his wife, as administrators of one Fox, and upon *plene administravit* pleaded, the plaintiff replies that they had assets to satisfy the aforesaid defendant, (whereas it should have been plaintiff;) and because that it was but the misprision of the clerk, it was held that it might be amended, the record now being brought before them by error. Het. 119. Mich. 4 Car. C. B. Mercer & Ux. v. Cardock & Ux.

42. If a clerk *mis-enters* a thing usual in matter of form, it is to be amended; but the error of the judge is not to be amended; per Roll Ch. J. who said he took it to be a rule. Sty. 412. cites Mich. 13 Car. Sawyer v. Horton, and Hill. 15 Car. Belch v. Fates.

43. A *mistake* of a clerk through *carelessness*, in an inferior court is amendable; but not if through want of skill. 12 Mod. 34 Hill. 4 W. & M. Bondler v. Orabb,

44. It was agreed that *want of form in an original* is not amendable, as *Debet and Detinet*, instead of *Detinet*, or vice versa. 12 Mod. 369. Pasch. 12 W. 3.

45. So if judgment be against 5, and one of them dies, and error is brought, and laid *ad damnum* of 4, without mentioning the 5th, this was not amended, because it was want of skill in the clerk. 12 Mod. 369. cites Walker v. Stokes. Comb. 354. Hill. 8 W. 3. B. R. Walker v. Stockoe S. C. resolved

and the writ of error quashed.—5 Mod. 16. 69. Walker v. Slackoe S. C. The note from the attorney to the curfitor was thus, viz. Inter A. in trespass and B. C. D. E. and F. defendants. (Note, F. one of the defendants is dead, make out a writ of error.) The court held the writ not amendable, and quashed it; and they were of opinion that supposing it only a mistake of the curfitor, yet it was not amendable, because it was to reverse a judgment, and the statutes were only to amend in support of them.—Carth. 367. S. C. resolved accordingly.

46. The curfitor had orders to make out a writ against 5, but one being dead, he made it out against 4 only. This was held not amendable, and full costs given on quashing the writ of error. 12 Mod. 370. cites Mich. 11 Geo. 1. Ginger v. Cooper.

## (C) Amendment by 8 H. 6. of Judgment in [302] Names.

[1.] If the parties are *right-named* in the record, and in the entry of the judgment one of the parties is *mis-named*, this shall be amended; for it is the fault of the clerk. Mich. 40, 41 El. B. R. per curiam. Mich. 14 Car. B. R. between Meriel and Doe, per curiam, adjudged in a writ of error, and the first judgment affirmed accordingly, which was at the day in bank it was entered after verdict, at which day *prædictus Stephanus*, where it should be *Carolus*, scilicet, the defendant for the plaintiff. Intratur Hill. 10. Rot. 1343.]

[2. If a man recovers in an action of *debt* against Elias Shortwell, and the judgment is *Quod prædictus Georgius Capiatur*, where it ought to be *Quod prædictus Elias Capiatur*, it seems this shall be amended, Cro. E. 609. pl. 11. Skarning v. Shortwell,

S. G. and by Fenner and Clench it was held amended, though it be in a judgment; for it is the mistake of the clerk. Contra Pasch. 40 Eliz. B. R. between Skaring and Shortwell, adjudged.]  
not amendable, because it is part of the judgment, and the act of the court.

Brownl. 56. Rogers's case S. C. and the court amended the mistake [ 3. If in an action by Ralf Rogers against Thomas Lake, the judgment be *Quod prædictus Rogerus recuperet*, this shall not be amended, though it be the mistake of the clerk, for this is the judgment of the court. Mich. 40. 41 El. B. R. between Rogers and Lake, per curiam.]

of the clerk; but afterwards the amendment was withdrawn by the court, and upon further advice the roll was made as it was before.

In debt by T. W. executor of J. W. the judgment was entered *Quod præd. J. W. recuperet*, where it should have been *Quod præd. T. W. recuperet*. Adjudged that it should not be amended as vitium clerici; for the judgment is the act of the court and not of the clerk. Goldsb. 124. pl. 10. Hill. 43 Eliz. Welcomb's case. — Mo. 366. pl. 501. S. C. accordingly for the same reason, and therefore no fault in the judgment is amendable. — Cro. E. 400. pl. 6. Trin. 37 Eliz. B. R. accordingly, and so judgment in C. B. was reversed. — But Cro. E. 865. in pl. 44. cites Mich. 33 & 34 Eliz. THOMAS WYLDE v. JOHN WHEELER, where the judgment was *Quod præd. recuperet versus præd. Thomam*, where it should be *Jobannem*, and it was amended. — Hutt. 41. cites WILD v. WOLFE, S. P. accordingly, and seems to be S. C. — Hob. 327. pl. 400. cites Wyld v. Wheeler, the precedent whereof was shewn that it was amended in the Exchequer-chamber after a writ of error. And says also that the precedent of Stephen v. John Morgan Wolf, Hill. 42 Eliz. was shewn, where the judgment was *Quod recuperet versus præfatum Morgan*, and it was amended in another term. — Cro. E. 864. pl. 44. John Morgan Wolf v. Stepney S. C. in Cam. Scacc. and awarded to be amended, and judgment affirmed. — Raym. 39 Arg. cites S. C. as amended. — So where in a judgment in Ireland the plaintiff's name was Robert M. and the judgment was entered *Quod prædict. Carolus M. recuperet*; the court in error brought here held it amendable, as the default of the clerk, though in the judgment the misprision being only in the name, which was right in the rest of the record that was before the clerk, and should have directed him. Vent. 217. Trin. 24 Car. 2. B. R. Meredith's case. — In action for words it was alleged that no issue was joined, because in the pleading and joining of the issue the defendant's Christian name was mistaken; but the court will amend that, it being rightly named in the record before. Vent. 25. Pasch. 21 Car. 2. B. R. Henly v. Burfall.

Mo. 697. pl. 970. Joyner v. Ognell, S. C. The action was brought by Joyner as executor of Skinner, which occasioned the mistake, and it was amended. — Cro. E. 865. in pl. 44. cites S. C. and that it was amended by order. [ 4. In a writ of debt, if the judgment be *Quod Humfrey Joiner recuperet debitum &c. nec non damna, &c. eidem Humfrido Skinner adjudicata*, this shall be amended, scilicet, Skinner for Joiner between Ognell and Joyner, adjudged in a writ of error in Camera Scaccarii. Cited Mich. 40, 41 El. B. R. to be lately adjudged.]

[ 303 ] [ 5. If a judgment be *Ideo videtur*, where it should be *Ideo confideratum est*, this shall not be amended, between Savaker and the Bishop of Gloucester. Cited Mich. 40, 41 El. B. R.]  
The case of the bishop of Gloucester and Savacre is in several books of reports; but this point of the (*videtur*) does not appear in any. — Yelv. 130. Trin. 6 Jac. B. R. Ventres v. Carter, adjudged error; and the same of *liquet* or *concessum*.

[ 6. If a judgment be *Ideo defendens in misericordia*, for *misericordia*, this shall be amended. Mich. 10 Jac. B. R. between Meghen and Dune.]

Cro. J. 307. pl. 4. Clifton v. Proctor, S. C. but S. P. does not appear. — Bulst. [ 7. In an action, if the declaration be against Amias, and in the residue of the record he is named *prædict. Annas*, (without any point supra) and the judgment is given against *prædict. Annas*, yet this shall be amended. Mich. 10 Jac. B. R. between Proctor and Clifton, adjudged.]

126. Proctor v. Clifton, S. C. but S. P. does not appear. — 2 Roll. Abr. tit. Trial, pl. 37. 39. S. C. but not S. P.

[ 8. If

[ 8. If in an original one of the parties is named *Barnabas*, and after in the pleading he is named *Barnabias*, this shall be amended by the original. Pasch. 17 Jac. 3. between Marsh and Sparry, adjudged.]

Hob. 249. pl. 326. S. C. but S. P. does not appear. Brownl.

130. S. C. & S. P. accordingly.

[ 9. If in an action against *Dematy Mowty*, in the *venire facias* he is right named, scilicet, *Dematy*; but upon the panel he is named *Demaey*, this shall be amended. Mich. 17 Jac. B. between Synons and Mowty, adjudged.]

## (D) Amendment after Verdict. In what Cases.

Fol. 202.

[ 1. **WHERE** by the amendment the jury should be subject to an attain, there shall be no amendment. 20 H. 6. 15.]

Because the court thought an

amendment after verdict would be perilous to attain the jury, though it was the clerk's fault, and so amendable, it was ordered to be put off till the next term, and in the mean time the court would advise. Sty. 207. Hill. 1649. *Sauderson v. Raifin*.

[ 2. If the record of *nisi prius* does not agree with the original record, this may be amended after verdict, if the amendment does not change the issue. Mich. 10 Car. B. R. per curiam. Pasch. 14 Jac. B. R. between Blackburn and Planke, per curiam, and otherways e contra.]

Roll Rep. 371. pl. 25. S. C. not adjudged, but it was objected that the

thing prayed to be amended would alter the issue, Quod fuit concessum per cur. and so seems admitted that it was not amendable.—And by Coke Ch. J. 3 Bulst. 161. Trin. 14 Jac. if such amendment changes the issue, it is plain it shall not be amended.—See 2 Roll. Rep. 312. where judgment was reversed, because the amendment could not be without altering the issue.—Roll. Rep. 353. S. P. per Coke Ch. J.

[ 3. In trespass, with a continuance from such a day till the day of the writ purchased, scilicet, such a day, which is mistaken, after verdict this shall not be amended, because the jury gave damages according to the day alleged, and therefore if it should be amended according to the date of the writ, the jury should be subject to the plaintiff's attain for giving too small damages. Contra 20 H. 6. 15.]

[ 4. In an action, if the plaintiff makes title by a demise made by *Thomas Bull and Agnes his wife*, and the parties are at issue, and the record of *nisi prius* was entered by the clerk, that the said *Thomas Bull and Anne his wife* made a demise, &c. and so the record of *nisi prius* differs from the roll, this shall not be amended, for if the record should be amended, the jury might be attainted, inasmuch as they found a lease made by *Thomas Bull and Agnes his wife*, and perhaps this lease will not prove a lease by *Thomas Bull and Anne his wife*. Mich. 42, 43 Eliz. between King and King, per curiam.]

[ 304 ]

Cro. E. 776. pl. 9. S. C. Gawdy and Finnerheld clearly, that this misnomer of the feme made it material, and avoided the whole lease, and

it is not the same lease whercof the plaintiff declares; but Popham doubted, because the naming the Christian name is idle, and not material; & adjournatur. But afterwards, Mich. 43 & 44 Eliz. it was reversed for the error assigned.

Roll. Rep.  
353. pl. 1.  
S. C. and  
the court  
agreed that  
such  
amendment  
would alter  
the issue  
clearly, and  
therefore it  
was ordered  
to stay till  
moved by  
the other

party. — 3

Bulst. 161. S. C. and because the day is a material part, and makes an alteration of the verdict, the whole court held it not amendable, and stayed the plaintiff's judgment.

\* Br.  
Amend-  
ment, pl. 27.  
cites S. C.  
& S. P. For  
it was mis-

prision of the clerk, and the plaintiff recovered so much as the jury found, notwithstanding that others said that the justices of nisi prius cannot take the inquest of more damages than are in their record. — S. C. cited 8 Rep. 162. a.

Cro. C. 274.  
pl. 12. S. C.  
adjournatur.  
— Ibid.  
278. pl. 17.  
S. C. and all  
the court  
held it  
amendable;  
for the re-

cord being good, and the clerk having it before him, it is merely a misprision of him; and the writ of distringas with the nisi prius is sufficient warrant to them to proceed, and they all held it directly within the 8 H. 6. cap. 12. and amendable. — Jo. 307. pl. 7. S. C. held per cur. accordingly. — In debt upon *escape* the venire and distringas was *Quandam juratam in placito transgressionis*, and for this cause judgment was stayed after verdict; for it is not aided by the statute of jeofails. But if the ven. fac. or distringas had been right, it had been otherwise. Cro. E. 258. Cottingham v. Griffith & Snow.

\* Gilb. Hist. of C. B. 133. cites S. C.

After a verdict it was moved to amend the *jurata* in the record of nisi prius, which was *Positur in respectu coram dom. rege & dm. regina, apud Westm. &c. 20 die Martii*, where it should have been *Coram dom. rege only*, and the day of nisi prius was mistaken; for the assises were on the 23d of Mar. The record was right in both. The court held this not amendable; for in all cases where the record of nisi prius hath been amended by the roll, the writ of distringas hath been right, which together with the nisi prius is a sufficient authority for the judge to try the cause; but here the distringas was wrong; for it was *Gulielmus & Maria Dei gratia*, when the queen was at that time dead. 5 Mod. 211. Pasch. 8 W. 3. Martin v. Monk.

[ 305 ]  
D. 261. a.  
pl. 25. it  
was held  
amendable;  
for as to the  
word præ-  
dict it can  
have no  
other in-  
tendment  
but to the  
substantive

[ 8. In partition against A. and Anthony B. A. confesses the partition, and judgment given accordingly, sed cesset executio, and B. pleads to issue, and in the record of nisi prius it is & prædictus similiter, omitting Anthony, but the principal record was perfect, and the jurata in the record of nisi prius is between the plaintiff and A. and B. defendants, where A. had confessed the action, and judgment given thereupon, and so he is a stranger to the issue, yet both faults shall be amended, because it is the fault of the clerk. D. 9 Eliz. 260. 24. between Wootton and Coke, adjudged.]

which is understood, viz. Antonius, and as to the other, both the record itself and the

the writ of nisi prius declare that the jury could not be against A. because he did not join any issue, and such misprisions in the records of nisi prius have been amended divers times. — 8 Rep. 161. b. 162. a. cites S. C. accordingly. — S. C. cited accordingly 3 Bulst. 161.

[9. In an action upon the *case for words*, if the *roll be right*, and the *bill upon the file right*, and the *nisi prius wrong*, scilicet, he (*prædictum Willielmum modo quærentem innuendo*) is a thief, whereas William was defendant; and upon Not guilty pleaded, the jury find him guilty, and the *postea* is endorsed that the defendant is guilty *modo & forma prout the plaintiff interius allegavit*, this *mistake of the plaintiff in the innuendo* shall be amended, because if the innuendo was omitted, it would be perfect enough. Pasch. 5 Jac. B. R. between Pierce and Gore, adjudged.]

Fol. 203.

Cro. J. 157. pl. 8. Piers v. Gore, S.C. accordingly, and the plaintiff had judgment.

[10. In an action of *debt* upon an obligation against Richard Carey, of which the condition was, that if Richard Carey, or John Carey, do pay such a sum to the plaintiff, that then, &c. and the record is further, *Et idem Johannes dicit quod ipse solvit* the said sum mentioned in the condition to the plaintiff, *et hoc paratus est verificare*, and the plaintiff replies, *Quod prædictus Richardus non solvit* the said sum, & *hoc petit quod inquiratur per patriam*, & *prædict. Richardus similiter*, and the issue was found for the plaintiff; the word (Johannes) shall not be amended and made Richardus, though this was the mistake of the clerk; for this will alter the issue; for the issue was joined before other parties. Pasch. 40 Eliz. B. R. between Heath and Carey, per curiam.]

[11. If an issue be joined whether J. S. recovered 200l. debt and 30s. costs against B. or not, and the record of the *nisi prius* is so also; but in the *venire facias* and *distringas* this is 200l. debt and 20s. costs, and the jury find the recovery of 200l. debt, and 30s. costs, according to the record, yet the *venire facias* and *distringas* shall not be amended; for it appears that the jury had no warrant to find 30s. costs, and the said writs are the warrant of the jury, and therefore if this should be amended, the verdict should be altered. Mich. 18 Jac. B. R.]

[12. If a man, being robbed, brings an action of *debt upon the statute of Winchester* against the hundred, and upon the *general issue* pleaded the jury find for the plaintiff, and the *verdict is entered* in this manner, *Dicunt pro quærente 222l. and damages 12d. and costs 6d.* whereas in this action *all ought to be given in damages*, yet because the intent appears, this shall be amended. Mich. 11 Jac. B. R. Painter's case, adjudged.]

[13. In an action of *trespass for a trespass in the time of K. James*, but the action was brought in the time of king Charles, and it is *contra pacem dicti nuper regis*, and the defendant pleads *De son tort demesne*, and the jury find him guilty, but it is entered that he did it of his own wrong, *contra pacem domini regis nunc*, this shall be amended. Mich. 14 Car. B. R. between Meriel and Doe, per curiam, adjudged in a writ of error, and the judgment affirmed accordingly. Intratur Hill. 10 Car. Rot. 1343.]

So where a trespass was done in the time of K. Charles the 1st. and in an action brought af-

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terwards

the declaration was *Contra pacem publicam*, and not *Contra pacem domini regis*, the court held it only a mistake of the clerk and so may be amended, and that as it is there is no repugnancy in it. Sty. 232. Mich. 1650. B. R. Pindar v. Dawkes.

The plaintiff declared for several trespasses, both in the time of Car. 2. and Jac. 2. and had judgment



judgment by default; after the return of a writ of enquiry error was assigned for want of an original. The custos brevium certified an original between the parties in the time of Jac. 2. which concluded Contra pacem nostram, which was objected could not be the original in this cause, for it should have concluded Contra pacem nostram nec non contra pacem Caroli secundi, &c. It was moved to amend it because the instructions to the curitor were right; the court ordered it to be amended; for a writ of trespass does not distinguish trespasses in one king's reign or another, but that is only distinguished by the conclusion, and for that instructions were particularly given according to usual manner in such cases. 2 Vent. 49. Trin. 1 W. & M. in C. B. Maffingburn v. Durrant.——2 Ld. Raym. Rep. 1058. in a note there cites S. C. and says that all the difference in the writs for several trespasses, where they are done in one king's reign, or in more, is in the conclusion, Contra pacem of one only, or Contra pacem of both; which was the reason why the court in Ventris, held it a matter of fact, and not a matter of law as was objected, and amendable.

[ 14. In an action upon the case upon an *assumpsit* for 43l. for arrears due upon an account, and an *assumpsit* to pay it, the defendant pleads *Non assumpsit*, and this is entered in the plea roll, but the issue upon the *nisi prius* roll is entered *Not guilty*, and upon this a verdict for the plaintiff, this shall be amended; for this is the mistake of the clerk having the plea roll before him, out of which he transcribed the *nisi prius* roll, and this does not alter the verdict, for *Not guilty* in an action upon the case upon a promise hath been held good after verdict, and *Not guilty* is non *assumpsit*, and more, for he cannot be guilty unless the *assumpsit* was made, and so the issue is all one in effect, and this amendment cannot attain the jury. Pasch. 15 Car. B. R. between Still and Jacob, adjudged per curiam. Intratur. Hill. 14 Rot. 376.]

Fol. 204. (E) Amendment per 8 H. 6. cap. 15. [Defaults in the *Venire Facias*, *Habeas Corpus*, and *Distringas*.]

See (B) pl. 1. 9. 10. and see a like head infra.

[ 1. ] If the *venire facias* be erroneous, and the *distringas* good, and the trial upon the *distringas*, this shall not be amended; because the principal process is not good, Hungerford's case, adjudged. Cites Trin. 38 Eliz. B. R. Earl of Rutland, 42 Coke 5.]

\* This is misprinted, and should be 5 Rep. 41. b. Rowland's case. —Cro. E. 310. pl. 20. Stainer v. James, S. C. accordingly.

[ 2. If upon the *venire facias* the sheriff makes no return, nor any name of the sheriff appears upon the back of the writ, nec quod executio istius brevis patet in quodam pannello huic brevi annexo, but this is *album breve*, this shall not be amended by this statute after verdict, upon examination of the sheriff, because this is the principal process. Co. 5. \* Roteland 41. b. adjudged; and there cites † 35 Eliz. B. to be so adjudged.]

† The case of Barney v. Walkley, cited Cro. E. 310. in pl. 20. as ruled in C. B. —3 Bulst. 220. cites Rowland's case, and S. P. held there accordingly. Mich. 14 Jac. Ackerige v. Conham.

No return was made either upon the *ven. fac.* or *distringas*. This was held per tot. cur. to be good cause to stay judgment after verdict, and that it is not aided by the statutes; for they aid misreturnus or insufficient returns; but here is no return, and so not aided, and judgment was said. Cro. E. 587. pl. 20. Mich. 39 & 40 Eliz. B. R. Becknam v. Rye.

The court refused to amend a *ven. fac.* which was *album breve*, though the sheriff's name was put to the panel; but if the sheriff upon the *venire facias* had returned that the execution of that writ did not



per in a cert. in panel annexed to that writ, and had not put his name to the writ of ven. fac. but so the panel, in such case the court would have amended the ven. fac. Brownl. 43. Trin. 15 Jac. Griffin v. Palmer.

[3. But if the *venire facias* be well returned, but the *issue* is tried upon the *habeas corpus*, and this is *album breve*, and no return thereupon, yet inasmuch as the *venire facias*, which is the principal process is well, this shall be amended upon examination of the sheriff by this statute, for this is a default in a return, as the statute mentions. Contra my Reports 10 Jac. B. between Porter and Blunt, adjudged, and Hobart's Reports 174. between \* Wilby and Wansey.]

\* Hob. 130. pl. 171. Wilby v. Quinsey. Hill. 4 Jac. S. C. that a new *venire facias* was awarded.—Mo. 868. pl. 1203. to be S. C.

cites it as ruled accordingly, Hill. 12 Jac. Wilby v. Gurny, and seems

[4. So if the *venire facias* be well returned, and the *issue* is tried upon the *distringas*, and this is *album breve*, and no return thereupon, this shall be amended upon examination of the sheriff, because the principal process is well, for this is a default in a return, as the statute mentions. Mich. 15 Jac. B. R. between Churcher and Wright, adjudged per totam curiam. Trin. 39 Eliz. B. R. between Wortley and Broadhead, adjudged, the sheriff not being out of his office, and the record being in the same court where it was returned. Contra my Reports, 10 Jac. Chaplain and Somes, adjudged.]

Assumpsit. The parties were at issue, and a *venire* awarded and returned, and also a *distringas*, and the matter tried by nisi prius; but it did not

appear upon the back of the *distringas* that it was returned. All the justices held, that it being in the same term wherein it came in, it may be amended; but if it were in another term, it could not be amended. Upon examination of the sheriff that he intended to return it, it was amended, and judgment for the plaintiff. Cro. E. 466. (bis) pl. 21. Pasch. 38 Eliz. B. R. Weare v. Woodliff.

After verdict for the plaintiff it was moved in stay of judgment, that the name of the sheriff was not indorsed to the writ of *distringas* with nisi prius, the court held it to be ill, and not amendable, nor helped by the statute 32 H. 8. and 18 Eliz. and said it is all one with the case of ven. fac. where the name of the sheriff is not thereto, which had been often adjudged not to be amendable, wherefore ruled the trial was ill. Cro. J. 188. pl. 10. Mich. 5 Jac. B. R. Holdsworth v. Procter.—Yelv. 110. S. C.

[5. If upon the return of the *habeas corpora* of a jury, the sur-name of the sheriff be omitted, as if it be *Bartholomæus Miles* sheriff, and (*Michell*) which was his surname omitted, this shall be amended. Hobart's Reports 158. between Kent and Hall, adjudged.]

Hob. 113. pl. 135. Mich. 42 & 43 Eliz. in case of Kent v. Hall.

Where the sheriff's name was not to the return of the *habeas corpora*, nor of the writ where the *decem tales* was returned, these were held manifest errors, per tot. cur. and the judgment reversible for that cause. Cro. E. 509. pl. 34. Mich. 38 & 39 Eliz. B. R. Blodwell v. Edwards.

[6. In trespass, if the *venire facias* and *habeas corpora* are in *placito debiti*, and thereupon a verdict is found for the plaintiff, this shall be amended. Hobart's Reports, case 306.]

Hob. 246. pl. 308. Harris v. Ap-John, S. C. and

the court amended it.—Brownl. 232. S. C. and it was amended, and made de *placito transgressionis*; per tot. cur.—S. C. cited Arg. 2 Ld. Raym. Rep. 1143. but Holt Ch. J. said that the case in Hob. had been held otherwise.—Cro. J. 528. pl. 6. Pasch. 16 Jac. B. R. the S. P. North's case, and a *venire facias de novo* was awarded.

In trespass *quare clausum fregit*, the *venire facias* was awarded in *placito transgressionis super seisin*, and the *issue-roll* was in *placito transgressionis* only. It was agreed that it should be amended; for the *issue-roll* is the warrant for the clerk. Litt. Rep. 54. Mich. 3 Car. C. B. Anon.

† See (B) pl.  
32. S. C.—  
† Hob. 68.  
pl. 75. S. C.  
for the ven.  
fac. is war-  
ranted, and  
must be  
amended by  
the roll.

[ 7. If a *venire facias* be, and *habeas ibi hoc breve*, without these words, *nomina juratorum*, which ought to be in of necessity, because otherwise the court cannot know who are jurors, nor whom to call to be sworn, yet after a verdict upon this writ it shall be \* amended, this being a *judicial writ*. It seems to be intended by this statute. Mich. 32, 33 Eliz. B. R. † Taylor's case, per curiam. Hobart's Reports, between † Priddy and Massie, adjudged.]

[ 8. If a *venire facias* be *quorum quilibet quatuor libras terre*, so that this word (*habeat*) was omitted out thereof, this shall be amended after the verdict. Mich. 40, 41 Eliz. B. R. adjudged.]

Cro. E. 467.  
(bis) pl. 24.  
Pasch. 38  
Eliz. B. R.  
S. C.—  
Mo. 465 pl. 657. S. C.—Ow. 59. S. C.—Noy. 57. S. C. but S. P. does not appear in any of those books.

[ 9. If the word *duodecim* be left out of the *venire facias*, yet this shall be amended after a verdict B. R. between Willoby and Gray, adjudged. Cited Mich. 40, 41 Eliz. B. R.]

[ 10. If the words *quorum quilibet* are omitted out of the *venire facias*, it shall be amended after verdict. Mich. 35 Eliz. B. between Haley and Lawes, cited Mich. 40, 41 Eliz. B. R.]

If the number of the qualifications be

(\*) Fol. 205.

[ 11. If the words *qui nulla affinitate attingunt* are left out of the *venire facias*, it shall be amended, because this is a *judicial writ*, and the fault of the clerk. Mich. 16 Car. B. R. between Woodland and (\*) Danvers adjudged, this being moved in arrest of judgment.]

omitted in the *venire*, yet it is sufficient, because that is ascertained by the law, and amended by the roll. G. Hist. of C. B. 132.

Cro. C. 595.  
pl. 12. Sloper v. Child,  
S. C. accordingly.  
—Trespas was brought in the county of Salop, and after issue between the parties, and *venire facias* awarded on the roll,

[ 12. After issue joined, if upon the roll a *venire facias* be awarded to the sheriff of the county of Somerset, &c. and upon this a *venire facias* is made in this manner, *Carolus Dei gratia Somerset salutem, &c. leaving out the word (vicecomiti)* and upon this the sheriff of Somerset returns a jury, and thereupon a verdict, &c. this shall be amended by the roll, because this was the default of the clerk merely, having the roll before him when he made the writ, by which he was directed to direct the writ to the sheriff of Somerset. Mich. 16 Car. B. R. between Child and Sloper, adjudged per curiam, in a writ of error upon a judgment in banco, and the judgment affirmed per curiam. Intratur. Mich. 15 Car. Rot. 651.]

(which award is always general) the *venire facias* was (*vicecomiti*) omitting (*Salop,*) a space being left for it in the writ, yet it was really executed by the sheriff of Salop. And Gawdy held that it should be amended; and by Fenner and Williams, *this is as no writ, because not directed to any officer*, and then it is aided by the statute of jeofails. Yelv. 64. cites it as Pasch. 3 Jac. B. R. Lee v. Lacon.—Brownl. 202. S. C. that it was only the default of the clerk, and was amended.—Cro. J. 78. pl. 9. S. C. and it being warranted by the roll, which is well, and it being judicial, it may be amended.—Yelv. 69. S. C. The court held that the best way is to amend it; and they took this diversity; where the action is laid in the county of Salop, and upon pleading specially the issue is drawn to a foreign county, there the entry and the award of the *venire* on the roll is special, viz. to the sheriff of the county where the issue is to be tried, and therefore in such case the *venire* with a blank will not be good, because it stands indifferent to the sheriff of which county it was intended, and therefore ill for the uncertainty. But where the general issue is taken, or matter triable in the same county where the action is laid, there the *venire facias* in the award upon the roll is only thus, viz. *Fiat inde jurata*, which must necessarily be to the sheriff of the county where the action is brought, and cannot be intended otherwise, and therefore is only the default of the clerk, which shall be amended, and so it was.—S. C. cited by Powell J. 2 Ld. Raym. Rep. 1067.

## (F) Amendment per 8 H. 6. 15. of a Judgment.

[1. **A** Judgment may be amended in *matter of fact*, where it is the mistake of the clerk.] In debt, the plaintiff had judgment to

recover 8l. but in the entry the clerk makes it 3l. but the mistake was amended in court, and made to agree with the record, it being the mere mistake of the clerk. Bulst. 217. Trin. 10 Jac. Benton v. Aymes.

*Matter of fact* in a judgment is a naked entry of the clerk, which shall be amended; as misnomer of one name for another, or of one year for another, and shall be amended according to the residue of the record; but *matter of law* which is the act and resolution of the court, if that be mistaken, though it be by the negligence of the clerk, it shall not be amended; as (capiatur) for (misericordia) &c. See Palm. 198. Trin. 19 Jac. B. R.

[2. In an action upon the *case*, if the plaintiff recovers costs, and further the record is entered that he shall recover *per incrementum assesses per jur.* 10 l. where it ought to be *per curiam*, for the court increases it, and not the jury, though here be but a letter mistaken, scilicet, an *J. for a C.* yet because this is in a judgment it cannot be amended by the statute. Mich. 38 39 Ed. [Eliz.] B. R. Bishop's case adjudged in a writ of error.] Cro. E. 497. pl. 17. Harecourt v. Bishop S. C. and held not amendable; for it is the default of the court in the

judgment, which never is amendable; for if it had been omitted by whom they were assessed, it had been clearly ill; and it is the same when entered to be assessed by a wrong person, it is not amendable.—Goldsb. 151. pl. 78. Hill. 43 Eliz. Harecourt's case S. C. the court at first held that if it was the default of the clerk it might be amended; but because the record was at the first (jur.) for (cur.) as it was certified the court held it not amendable, because it is parcel of the judgment, and that the judgment of the court never was amended here.

[3. In an action upon 2 Edw. 6. of tithes, if the plaintiff declares that the defendant was occupier of certain lands, and sowed it with buck-wheat, barley, &c. and after cut the said wheat, barley, &c. growing upon the said [lands,] and carried it away without setting out the tithes, and upon nil debt pleaded, a verdict was given for the plaintiff for the wheat, barley, &c. and after judgment is given to recover the said debt given by the jury for the said buck-wheat, barley, &c. this shall be amended; for in all the record no mention is made of buck, but only that it was sown, and perhaps it did not increase, and the judgment refers to the verdict, which was before the clerk, and so perhaps his fault. Tr. 1650. between Gibon and Kent, adjudged in a writ of error upon a judgment in B. Intratur 24 Car. Rot. 60.] Sty. 212. Gibbon v. Kent S. C. but S. P. does not appear.

[4. If a judgment be given against the plaintiff upon a demurrex, and the judgment is entered in this manner, at such a day the plaintiff *exactus non venit, ideo nihil capiat per breve*, which is the form of the entry of a nonsuit, and not of a judgment upon demurrer; for upon the demurrer it is not *quod exactus non venit*, this shall be amended; for this is the default of the clerk. Hill. 13 Jac. B. R. between Wheeden and Sugg, adjudged.] Roll Rep. 309. pl. 19. S. C. and the court agreed that it might be amended notwithstanding the error was

in another court, and judgment was given to amend it.—Cro. J. 372. pl. 2. S. C. but S. P. does not appear.—G. Hist. of C. B. 141. S. P.

Roll. Rep.  
272. pl. 45.  
Anon. S. C.  
according-  
ly. ———  
3 Bulst.  
114 in a  
nota there  
seems to be  
S. C. and

[ 5. If a jury finds for the plaintiff, and gives 2s. damages, and so much for the costs, and the clerk in the entring thereof says 2s. for damages, and so much for costs, and so much pro incremento quæ in toto se attingunt to so much, in which sum the 2s. is not comprehended, this shall be amended, because this is the default of the clerk only in miscasting the total sum. Mich. 13 Jac. B. R. adjudged.]

because it was in the same term, and the omission of the clerk only in the account, and casting up the quæ in toto, which is not very material, the same was amended by rule of court. — See D. 55. b. pl. 8. Trin. 35 H. 8. Trewinnarde v. Skewys, where it is held that such mistaking is the default of the clerk. — G. Hist. of C. B. 141. says the court will amend it by the judgment book, because that is a sufficient instruction to the clerk to enter the judgment by; and therefore it was his misprision not to go according to his instructions which may be rectified and amended. See Tit. Miscasting per totum.

— Fol. 206.

[ 6. In trespass for a battery, if the defendant appears and im-  
parks to a day the same term, and no idem dies is given to the plaintiff,  
though it be entered that the defendant habuit diem, &c. usque, &c.  
per curiam, &c. so that this is the judgment of the court, and  
though after judgment be given by nil dicet against the defendant, yet  
this shall be amended, \* being the fault of the clerk not to enter the  
continuance. Pasch. 10 Car. B. R. between Margse and Melhuish,  
adjudged per curiam, after a writ of error brought in camera  
scaccarii thereupon.]

So where it  
was found  
for the  
plaintiff for  
10 messua-  
ges, 15 acres  
of meadow,  
and 20 of  
pasture,  
and Not  
guilty as to  
the residue,  
and this be-  
ing entered  
thus of re-  
cord, the  
judgment  
was that

[ 7. In an ejectione firmæ for one messuage, two cottages, and cer-  
tain lands, the jury find the defendant guilty as to a moiety of the  
messuage and land, and not guilty for the two cottages and the other  
moiety of the messuage and land, and judgment is given Quod que-  
rens recuperet terminum suum prædict. de medietate tenementorum  
prædictorum, & eat sine die for the rest, though it may be intended  
that this judgment is given for the moiety of the two cottages, of  
which he is found Not guilty, inasmuch as it is tenementorum  
prædictor' yet it shall be amended, being only the default of the  
clerk, having the postea before him when he entered the judg-  
ment. Mich. 13 Car. B. R. between Sawyer and Hawkins, per  
curiam, amended; and they said this was amendable by the common  
law, without the help of any statute.]

the plaintiff recover the messuages, and a greater quantity of acres than was in the ver-  
dict, and upon error brought it was resolved by 3 justices, (absente Hutton) that this is the  
default of the clerk in not entering the judgment according to the verdict, and upon view of di-  
verse precedents so resolved the record was amended. Jo. 9. Mich. 18 Jac. Anon — Cro. J. 631.  
pl. 5. Mason v. Fox & al'. Hill. 19 Jac. seems to be S. C. and resolved accordingly by all the  
judges of B. R. and barons of the Exchequer, except Tanfield Ch. B. who doubted.

[ 8. In an ejectione firmæ of land, if upon not guilty pleaded a  
verdict is found for the plaintiff, and costs and damages given per  
curiam, and thereupon judgment is given Quod querens recuperet  
the damages and costs, and not quod recuperet terminum as the use  
is, this is the fault of the clerk, this being the usual judgment in  
this action, though it be but a trespass in its own nature, and  
therefore it shall be amended. Hill. 15 Car. B. R. between Belch  
and Pate, per curiam, amended upon a motion after a writ of  
error brought in camera scaccarii.]

[ 9. In

[ 9. In an action upon the *case against baron and feme for scandalous words spoke by the feme*, and judgment given for the plaintiff, and the *feme only in misericordia*, where the baron also ought to be, and yet if it be right in the prothonotary's book, it shall be amended. Hobart's Reports 27. between Scarfe and Nelson.]

Hob. 127.  
pl. 159.  
Scaife v.  
Nelson.  
Mich. 12.  
Jac. S. C.—  
Mo. 869.

pl. 1206. Skaifes v. Nelson, S. C. accordingly.—Brownl. 16. S. C. accordingly.—Cro. J. 633.  
in pl. 5. cites Nelson v. Skeits, S. C. accordingly.—S. C. cited Raym. 39. Arg.—Gilb. Hist. of  
C. B. 142. cites S. C.

[ 10. If the *mayor, commonalty, and citizens of London* bring an action of *debt* against B. and recover, and judgment is given *that the mayor, commonalty, and citizens recover the debt, and 20s. costs de incremento ad requisitionem majoris & communitatis*, and it is *not civium*, as it ought to be; for \* costs de incremento ought not to be given without the assent or request of the plaintiff, yet *if the docket*, which is the warrant to the clerk for the entry of the judgment, *be right*, and the word (*civium*) therein, it shall be amended; for it was the default of the clerk. Hill. 15 Car. B. R. between the Mayor and Commonalty of London and Heyling, after a writ of error brought, and this assigned for error.]

[ 311 ]  
Cro. C. 574.  
pl. 15.  
Healings v.  
the Mayor,  
&c. of Lon-  
don S.C.  
awarded ac-  
cordingly.  
\* See 10 &  
17 Car. 2.  
f. 1. where  
it enacts,  
that "no

" judgment after verdict, confession by cognovit actionem, or relicta verificatione, shall be re-  
" vered, for that the increase of costs, after a verdict in an action, or upon a nonsuit in replevin,  
" are not entered at the request of the party for whom judgment is given."

The names of the plaintiff and defendant may be amended if the docket be right; but if the docket roll and judgment be both mistaken, quære whether this will be amended; for the docket roll is the index to the judgment, and made at the same time, in order that purchasers may find out such judgments, and be safe; therefore if the docket roll be right, the judgment will without doubt be amended, because there is a proper indication to purchasers that there is such a judgment, and there is sufficient in the record from whence to amend the judgment, but if the docket and judgment both be wrong in the names, the purchaser may be deceived; and quære, how far the court will amend the judgment, though there be sufficient instructions on the record to amend it by; because a purchaser may be defeated of his title by this amendment, though he has done every thing the law requires to make himself secure in his title. But since the stat. 4 & 5 W. 3. cap. 2. the court will amend the judgment, but not the docket, if the judgment be right and the docket wrong. Before the statute the judgment bound the lands, because the judgment was the lien on the lands, and the docket no more than an index to find the judgment readily, and the stranger aggrieved by such misdocketing had only his remedy against the officer for not docketing them truly. But since the statute such judgment does not bind the purchaser, for a false docket is as none. G. Hist. of C. B. 140, 141.

[ 11. In an action of *debt in the Common Pleas by bill against an attorney*, (as it ought to be) if judgment be given upon *demurrer* against the plaintiff, but it is *entered quod querens nil capiat per breve*, where it ought to be *per billam*, the action being brought by bill, this shall be amended, because this was the fault of the clerk, inasmuch as he *entered it having the record before him*. Mich. 16 Car. B. R. between Burbidge and Raymond, adjudged *per curiam*, in a writ of error upon such a judgment in banco. In-  
tratur Trin. 15 Car. Rot. 1657. and the judgment in banco af-  
firmed accordingly.]

Cro. C. 580.  
581. pl. 5.  
Reymond  
v. Burbedg.  
S. C. says,  
it was held  
a manifest  
error, un-  
less it were  
the mistake  
of the clerk  
and amend-  
able; but  
the court

doubted thereof, because it was in the judgment which is by the court, and not to be accounted the entry of the clerk only. But the court would be advised.

[ 12. If the *defendant in an action in B. R. appears and pleads, but does not put in any bail, the defendant*, after a verdict for the plaintiff, shall not have *advantage of his own default* to stay the judgment;



judgment; but he shall be compelled to put in bail. Trin. 39 Eliz. B. R. between the Lord Darcy and Tirret. Adjudged contra Mich. 11 Jac. B. R. per curiam.]

Fol. 207. [13. But in an action of trespass in B. R. against two, if one puts in bail, and the other not, but both plead to issue, and a verdict passes for the defendants, and after the plaintiff shews this matter to the court that no bail was entered for one of the defendants, the defendants shall not after be received to put in bail, because this was their own fault. Trin. 16 Jac. B. R. between Gabriel Denys, plaintiff, against Smallridge and Bremblecombe, defendants, adjudged in arrest of judgment per totam curiam.]

Roll Rep. 372. pl. 27. S. C. and the bail was entered accordingly. — 3 Bulst. 181, S. C. according-ly, and bail was now entered as of the same time in which it ought to have been entered. \* [312]

[14. If A. recovers against B. but there is not any common bail filed for B. and the attorney of B. is dead, but it appears to the court that the attorney had received his fees for the entry thereof, and \* this appears by the attorney's book, though the attorney cannot now be examined, yet this shall be entered upon this matter. Pasch. 14 Jac. B. R. between Denham and Cumber, adjudged.]

\* [312]

\* Roll Rep. 82. pl. 27. Bolde v. Walter, S. C. accordingly; for there is no reason that the entry by the clerk shall prejudice the party, and so it has been often ruled.

[15. If a special verdict be found, and a material thing is not entered in the record, but this thing is found in the notes under the hands of the counsel of both parties for the special verdict, this may be amended by the notes, though the record was made up, and the judgment given, without the finding of this thing; for the jury found all that was in the notes. Mich. 12 Jac. B. R. between \* Bowlde and Walter, adjudged. H. 4 Jac. B. R. between Hill and Prowse, adjudged.]

Hob. 184. pl. 224. Trin. 15 Jac. S. C. which was

[16. A record may be amended according to the book of the office. Hobart's Reports 249. Chamberlayne's case, per curiam.]

an action on the statute of hue and cry, and after issue joined and entered the record was of a robbery done the 30th of October, but upon the oath of the plaintiff's attorney that the book of the office was September, and shewing the book, the court ordered it to be amended.

In B. R. they will amend both the bill and the roll of the office paper-book, because this is instructions for making them both; but they cannot amend from any other paper-book, because such book is not instructions left in the office to make up both the roll and the bill. But where there is no office book, as where the general issue is pleaded, it seems they should amend either the bill or the roll, by the declaration by which they gave the defendant a copy, because such declaration is the only instruction to the clerk of the office to enter. G. Hist. of C. B. 115.

Jat. 165. Arg. cites S. C. by the name of Gleeson v. West.

[17. In an *ejectione firmæ*, if the bill be not perfect, but spaces left for the quantities of the land and meadow, and after the paper-book given to the party is made perfect, and the plea-roll, and *nisi prius* roll, but the bill upon the file is not yet made perfect, and after a verdict is given for the plaintiff, this imperfection of the bill shall be amended, because the party is not deceived thereby, because the paper-book which he had was perfect, and this was the neglect of the clerk not to amend the bill when the party gave him information of the quantity. Trin. 15 Jac. B. R. between Leeson and Weste, adjudged.]

[18. In



[18. In *debt against an executor*, if the defendant *pleads nothing in his hands, &c.* and the plaintiff *replies, assets die impretationis billæ, scilicet*, and *leaves a blank for the day*, and after in the *paper-book a day is put in*, and in the *nisi prius roll*, but no day is in the bill upon the file, and after it is found for the plaintiff, scilicet, that the defendant had assets, &c. the plea roll shall be amended according to the paper-book and the nisi prius roll; for neither the party nor jury are deceived thereby. Mich. 12 Jac. in camera scaccarii, between Dame Platt and Goldsmith, adjudged; quod vide Mich. 12 Jac. B.]

[19. If the *imparlance roll* in bank differs from the plea roll in matter of *substance*, yet this shall not be amended by the plea roll, but the plea roll may be amended by the imparlance roll, because the imparlance roll is the ground of all. Mich. 13 Jac. between Barker and Parker, per curiam.]

In trover and conversion, the imparlance roll want. d the day and year of the

possession and conversion, but upon a motion after verdict in arrest of judgment, the issue roll was amended. Hutt. 84 Hill. 12 Jac. Parker v. Parker.—Brownl. 9. S. C. says it was entered with spaces for the possession and conversion, but both those spaces in the issue were filled up and held good.—Hob. 76. pl. 69. S. C. that the imparlance roll had spaces, but the issue roll and all the rest were perfect in this point; the court were of opinion that the imparlance roll could not be amended by the issue roll, because it was the original, and was to warrant the other, but because upon Not guilty verdict was given for the plaintiff, the court gave judgment for him, the declaration as it was found in the imparlance roll being good enough in matter; for the trover and conversion was laid in the preterperfect tense, and so before the action brought, and so the default in the declaration being only in the form was holpen by the statute of Jeofails.—S. C. cited Litt. Rep. 279. by Moyle prothonotary, who said he feared that it would be amended, and therefore he moved for a recordatur, and error brought thereupon.—Het. 143. S. C. cited by Moyle accordingly.—Lat. 165. cites S. C. and says, That though a recordatur was entered, yet the plaintiff had judgment.—See (B) pl. 12. S. P.

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[20. In *trover and conversion*, if the bill upon the file be that *he was possessed of goods at D. and lost them*, and the defendant found them, and after converted them to his own use, and *no place is put of the conversion*, nor any space left for the place of conversion; but after the declaration is made perfect with the place of conversion, scilicet, D. where the possession and trover was, and the paper-book given to the defendant, and the nisi prius roll and all the record was perfect, besides the bill upon the file which is not amended, and upon Not guilty pleaded, a verdict is given for the plaintiff, and \* this being assigned for error in camera scaccarii, was amended per curiam. Trin. 7 Car. B. R. between Rouch and Browne, adjudged, because neither party nor jury are deceived thereby, and upon the shewing of this amendment in camera scaccarii, the court there affirmed the judgment without a new writ of diminution.]

See (H) pl. 5. S. C. and the note there.

\* Fol. 208.

[21. If it appears to the court that in a *venire facias* the word *Chimly* is rased and made *Himly*, this shall be amended. Mich. 10 Jac. B. R. adjudged, per curiam.]

[22. In an *ejectione firmæ* upon a lease made the 10 May, and after a verdict for the plaintiff, this is rased and made 11 May, by which it is erroneous, yet if it appears to the court that it was rased and made so without lawful authority, it shall be amended though the rasure be felony. Mich. 2 Car. B. R. between Foster and

Poph. 196. S. C. and per tot. cur. it was amended after error brought,

but nothing and Taylor, adjudged in a writ of error, this being also amended is mention- before in banco.] ed there of

the felony.—Lat. 162. S. C. accordingly.—G. Hist. of C. B. 146. S. P. and seems to intend S. C. and says that if any part of the record be vitiated by rasure they will restore it by amendment, because the wickedness of any person in corrupting the records of the court ought not to obstruct the justice of the court, or prejudice any of the parties.

*Judgment was entered against A. and M. his wife*, but the word *M. was rased*, as appeared plainly upon view of the record. *M.* was taken in execution, and she brought a writ of error in the Exchequer-Chamber, for that no judgment was had against her. It was moved that this being an apparent practice to avoid the execution the record might be amended, and a special entry made that it was rased and amended, to which the whole court agreed. 2 Roll. Rep. 80. Pasch. 17 Jac. B. R. Whiting v. Abington.—But it was touched by Haughton. that if the record should be amended and the judgment made perfect, then the delinquent could not be impeached of felony for the rasure; for the statute is, That if the rasure was such, that the judgment be defeated, &c. But Moun'ague Ch. J. and Yelverton J. were of a contrary opinion clearly, and that the rasing the record is the offence that makes the felony, and not the annulling the judgment thereby. 2 Roll. Rep. 82. in the case of Whiting v. Abington.

23. In *assise*, if the *plaintiff be essoigned* this essoign shall be entered in the roll of the *assises* and not in the *essoign roll*, and if it be it is misprision of the officer, and shall be amended. Br. Amendment, pl. 91. cites 30 H. 6. 1.

### [ 314 ] (G) Per 8 H. 6. In what Cases it may be.

Br. Amend-  
ment, pl. 5.  
cites S. C.  
and says,  
sic vide,  
that for  
default in  
the count  
the writ

[ 1. ] *N trespass in London*, the declaration was entered in the roll, and dies interloquendi given, and because a space was left for the parish and ward which were not put in the roll, the plaintiff would have amended it, but the defendant would not suffer it, and adjudged that it should not be amended, but judgment was given against the plaintiff. 20 H. 6. 18.]

shall abate and not the count only.—Br. Count, pl. 12. cites S. C.—Fitzh. Amendment, pl. 28. cites S. C.—8 Rep. 161. a. cites S. C.

[ 2. If a thing which the plaintiff ought to have entered himself, being a matter of substance, be totally omitted, this shall not be amended; but otherways it is if it be not totally omitted, but only in part, and misentered. 10 H. 7. 23. b. per curiam.]

Br. Amend-  
ment, pl.  
113. (112.)  
cites 11 H. 7.  
26. [a. pl.  
8.]

[ 3. If in an *assise* the tenant pleads in bar, that A. a stranger was seised, who enfeoffed B. who died seised, whose estate he himself hath, and the plaintiff claiming in by a deed of feoffment, &c. upon whom D. entered, upon whom the plaintiff entered, where it should be upon whom the tenant entered; so that there is only a mistake of plaintiff for tenant in giving colour this shall be amended because the fault of the clerk. 10 H. 7. 23. in a writ of error. \* 11 H. 7. 2.]

\* This is at  
11 H. 7. 2.  
a. pl. 7.

\* But see  
stat. 16 &  
17 Car. 2.  
cap. 8.  
which helps

[ 4. If a defence is omitted or an \* averment, scilicet, the which matter he is ready to aver, this shall not be amended. 10 H. 7. 23. b.]

the want thereof after verdict.—Br. Amendment, pl. 113. (112.) cites † 11 H. 7. 23.

† This is a mistake and should be according to Roll.

5. After

5. After verdict in assumpsit it was moved, that the plaintiff had altered his count in the consideration of the promise, and in the promise itself after he had pleaded, so that thereby the same issue which is tried is not that which was joined; for the action was brought on a special promise, and not on a promise in law, as the alteration would make the promise to be, and therefore it is a material alteration. And per Roll Ch. J. the thing altered is material, and ought not to be amended. Sty. 117. Trin. 24 Car. Reader v. Palmer. All. 69. Read. v. Palmer S. C.

6. If a clerk misenters a thing usual in matter of form, it is to be amended; but the error of the judge may not be amended; held by Roll Ch. J. as a rule. Hill. 1654. Sty. 412. in case of Barker v. Elmer.

### (H) At what Time it may be.

[1.] If a writ of error be brought in camera scaccarii upon a judgment in B. R. and this allowed, and a transcript of the record certified (as the use is, for the record remains in B. R.) yet after this the judges of the King's Bench may amend the record, which is there, in a matter amendable, for thereupon the party may \* allege diminution, and so make the amendment appear in camera scaccarii, and so be helped. Trin. 15 Jac. B. R. per totam curiam adjudged præter Houghton, who held strongly e contra, Mich. 25 Jac. between the lessee of Sir Walter Coap and another, adjudged per totam curiam; for when the record is amended here, the clerk of the court may go into camera scaccarii and amend the transcript according to the record. Tr. 19 Jac. B. R. Sir George Trencher's case, adjudged.] \* Cro. J. 429. pl. 4. S. P. in the same term and year, and seems to be S. C.— Error was brought to reverse outlawry in writ of debt which was against J. B. of C. knight, and the capias was accordingly,

but the alias, the pluries capias, and the exigent omitted knight, and this was assigned for error, and by the opinion of the court it may be amended by the stat. of Leicester, as well after the record is removed for error as before. Br. Amendment, pl. 31. cites 7 H. 6. 27.

A special verdict was amended after error brought and record removed out of C. B. 2 Jo. 211. 212. Trin. 34 Car. 2. B. R. Nailer v. Clarke.

\* [315]

[2. If a man recovers in replevin in B. and after a writ of error is brought thereupon, and a mittitur entered upon the record, yet they may after receive a warrant of attorney; and it shall be entered. Trin. 9 Jac. B. R. between Chalke and Peeter, dubitatur.] Fol. 209. Godb. 167. pl. 235. S. C.

—2 Brownl. 289. S. C.—8 Rep. 136. b. Sir Francis Barrington's case S. C.—But I do not observe S. P. in either of those books.

[3. In an ejectiōne firmæ upon a lease made 10th of May, after a verdict for the plaintiff it is made the 11th of May by a rasure, and thereupon a writ of error is brought, and assigned for error that he hath declared upon a lease made the 11 May, which is plain error; yet if upon examination it appears to the court that it was made bad by a rasure, it may be amended and made the 10 May as it was before, though this error be assigned. Mich. 2 Car. B. R. between Foster See (F) pl. 22. S. C. and the notes there.

Foster and Taylor, adjudged and amended, this being also before amended in banco.]

See (B) pl. 16. S. C. and the notes there.

As to mending after plea pleaded, there is no great matter in that. After a record has been sealed up, I have known it amended,

even just as it was going to be tried; per Holt Ch. J. 1 Salk. 47. pl. 3. Hill. 8 & 9 W. 3. B. R. The king v. Harris & al'.

Harvert for Harbert (being only vitium scriptoris) was amended upon motion, though issue was joined, and the cause entered upon record. Cumb. 4. Mich. 1 Jac. B. R. Anon.

After the record was removed, and the error assigned, it was moved to amend the entry after imparlance, which was ad quem diem venit tam predictus Thomas, quam predictus Samuel, per attornatos suos, &c. Et predictus Thomas defendit vim, &c. so that Thomas was mistaken for Samuel, which was alleged to be but the default of the clerk, and it was ordered to be amended. Cro. J. 444. pl. 22. Mich. 15 Jac. 1. Leeler v. West.

[ 4. In an *assumpsit* for wares sold, the plaintiff declares that he sold tres virgatus, Anglice silk, and leaves out the word serici, and after verdict and judgment for the plaintiff in B. R. a writ of error was brought in camera scaccarii, and this assigned for error, and the court inclined to reverse the judgment; but upon examination of Mr. Pye and his servant in B. R. it appears that the paper book was well, and the word serici inserted therein before plea pleaded, and thereupon the record was amended accordingly. And after the court of camera scaccarii caused Mr. Wright, the clerk of the errors, to bring the transcript of the record in B. R. and there to amend it by the record. Mich. 5 Car. between Young and Skipwith, adjudged.]

[ 5. In a *trover* and conversion of goods, if the bill upon the file in B. R. be that the plaintiff was possessed of goods at D. and lost them there, and that the defendant found them there, and after, &c. converted them to his own use, and does not set forth any place of conversion, but in the declaration thereupon a place of conversion (scilicet D. the same place where the possession, loss, and finding were laid) is set forth, and not guilty pleaded, and all the record after hath the said place of conversion, and also the paper-book delivered to the party, and after a verdict for the plaintiff a writ of error was brought in camera scaccarii, and this assigned for error, and the bill certified without any place of conversion, yet after in B. R. upon shewing this to the court, and that the party or jury were not deceived, it was amended there; and upon shewing this in camera scaccarii the judgment was affirmed without any amendment of the transcript.]

See (F) pl. 20. S. C.

† [ 316 ]

6. In *assise* the record cannot be amended by justices assigned, after the adjournment in bank. Br. Amendment, pl. 58. cites 17 Aff. 2.

It was said that the matter comprised within the writ cannot

7. It was agreed that a bill sued in the exchequer or before justices may be amended as well after challenge of the party as before; per Hank. And Persey said that it may well be, if it has substance. Br. Amendment, pl. 28. cites 2 H. 4. 17.

after the challenge of the party. Thel. Dig. 223. lib. 16. cap. 6. S. 5. cites Trin. 2 H. 5. 8.

But in *præcipe quod reddat*, that is to say writ of entry against 4, and in the clause of misfeasant were 3, and the fourth was left out, and it was challenged; [but] because it was a small default, and the demandant [had] prayed leave to amend it before it was challenged, therefore it was amended; quod nota; for the court said that of custom such defaults have been amended before challenge of the party. Br. Amendment, pl. 35. cites 3 H. 6. 37.—Thel. Dig. 223. lib. 16. cap. 6. S. 5. cites Hill. 8 H. 6. 38. S. P. accordingly.

8. It was said that the justices cannot amend their own *default in judgment* in another term; but if it had been in process, they might have amended it. Br. Amendment, pl. 46. cites 9 E. 4. 3.

9. In *scire facias as cousin and heir* they were at issue, and *no cosinage was declared*, and exception taken in another term, and the *cosinage was declared in a bill*, but the clerk did not enter it, and because it was in another term it was not amended; but the writ was abated after issue. Br. Amendment, pl. 107. cites 38 H. 6. 39.

10. If the party pleads *quod in nullo est erratum*, yet a thing amendable shall be amended after; per tot cur. Br. Amendment, pl. 113. cites 11 H. 7. 2.

11. In replevin the plaintiff counted of a taking in *Twinocke*. The defendant avowed the taking in *Turnocke*, absque hoc that he took in *Twinocke*. The plaintiff *imparled*, and all this was entered in the roll of record, and afterwards one of the clerks amended the declaration and made it *Turnocke*, and because the plaintiff had not joined issue, but imparled, the amendment was allowed; but if the plaintiff had replied and an issue joined and entered, then if the count had been amended after issue joined, the court said that they would have made it again as it was at first. Dal. 83. pl. 31. 14. Eliz. Anon.

12. In *waste* for digging in lands &c. the defendant pleaded that the Queen by her letters patents under the great seal, granted unto him that he might dig for mines of coal &c. and prayed that it might be entered verbatim, and a grant under the seal of the Exchequer was entered, whereupon the plaintiff demurred. By the opinion of the court, it could not be amended after demurrer entered. Goldsb. 1. pl. 3. Pasch. 28 Eliz. Anon.

13. It was held that if a writ of error be brought, and delivered to the Chief Justice of C. B. and allow'd by him under his hand that afterwards the record cannot be amended by prothonotary, attorney, or clerk of the court, though no record be entered upon the roll, whereupon the writ of error is brought. 4 Le. 51. pl. 133. Trin. 32 Eliz. C. B. Curtis's case.

Want of pledges returned by the sheriff was permitted to be amended by him after error brought.

3 Lev. 344-345. cites Trin. 5 W. and M. Nicholas v. Chapman.—3 Lev. 361. S. C. in C. B. accordingly.—Ibid. says a rule was produced that it was so done in B. R. between Boynton and Morgan.

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14. After a plea enter'd in B. R. the defendant may either amend his plea or put in a new plea, as he shall be advised, at any time before replication. This was said to be the course of B. R. and made a rule of court to be observed for the future. Bulst. 186. Pasch. 10 Jac.

15. No amendment by striking out or altering any thing, or any part of a matter alleged, can be after demurrer; per tot. cur. Bulst. 204. Pasch. 10. Jac. in a nota there.

After demurrer the record cannot be made up till de-

murrer be joined, and so long as it is in paper, the parties may amend any thing without motion; and they may also amend afterwards, so as the matter will not much deface the record. Sid. 107. pl. 19. Hill 14 & 15 Car. 2. B. R. in case of the queen mother v. Somersham (inhabitants.)

On rule to shew cause why the plaintiff should not amend his declaration on payment of costs,



costs, and liberty to plead de novo, it was objected that the defendant had demurred, and the plaintiff joined in demurrer, and the roll actually made up; but the court said that this was only a loose roll of this term, and therefore would consider it as all in paper, and accordingly made the rule absolute. 2 Barnard. in B. R. 65. Mich. 5 Geo. 2. Pool v. Hamerton.

The plaintiff declares, and the defendant pleads, and the plaintiff replies, and the defendant demurs, and the plaintiff joins in demurrer. The question was, whether the plaintiff should amend his declaration; and the true distinction upon the debate of the judges at Serjeant's Inn seemed to be this, that where there is a demurrer, if the cause be still in paper, upon paying of costs, and giving the defendant liberty to alter his plea, the plaintiff may be at liberty to amend, because the pleading in paper came in only instead of the antient way of pleading ore tenus; and in the pleading ore tenus the record was only in fieri, and therefore though a man had joined in demurrer, he might come before that was entered on record, and pray to withdraw his demurrer and amend; but after the pleadings were entered on record of the same term, then it could not be amended or altered. This was upon the constitution of Ed. 1. which forbids judges to alter or change any of the records or rolls of the court; and therefore no alteration can be made in a record, unless it be in the same term, whilst the record is supposed to be in fieri; but out of this rule we must except all amendments made by virtue of the statute of Jeofails; for those enables the courts to amend at any time within the purview of such statutes, G. Hist. of C. B. 92. 93.

In *quo warranto* to know by what title they enjoy ballastage of ships upon the River Thames, it was agreed per cur. that *after plea pleaded* the defendant may amend, without paying costs before demurrer joined, because the trial is of the highest nature, and as *peremptory as in a writ of right*; but they thought he could not amend after demurrer joined. Sid. 54. pl. 21. Mich. 13. Car. 2. B. R. The Attorney General v. Trinity-House.

After in nullo est erratum pleaded a rule of court was obtained to amend the error assigned, but it was discharged on a motion for that purpose; for after such plea, it is never admitted to amend general errors. 8 Mod. 304. Mich. 11 Geo. 1. Barnsly v. Shrimpton.

16. A writ of *error* was brought, and *errors assigned*, and a *sci. fac.* issued, and *before the defendant in error joined in nullo est erratum*, it was moved to amend the judgment, the entry being the default of the clerk; but the question was, whether the time for amendment was not passed after errors assigned. Resolved by three justices (absente Hutton) that the time was not passed, but that *so long as a diminution may be alleged, or certiorari awarded*, they may amend. Jo. 9. pl. 8. Mich. 18 Jac. C. B. Anon.

17. In error of a *common recovery* the record was *certified and entered in the roll*, and the *recovery was pleaded in bar* of the writ; but the *alleging of the seisin and execution of the recovery was omitted* by negligence of the clerk and counsel. And two terms after, which was the term after demurrer joined thereupon, the defendant prayed to amend it, and urged that without consent of the other side the court might amend it, because it was the default of the clerk, who had his pattern, viz. the recovery before him, and he had omitted the sense of it; and Mountague Ch. J. accorded to it; but upon information that the course of the court was otherwise, he changed his opinion; and all the other justices agreed, and so it was not amended, because it was *not the negligence of the clerk only, but also of the counsel*, and perhaps this was the cause of the demurrer. And Haughton took a *difference where the clerk does it as officer of the court, and where as attorney of the party, and as a plea in bar*; and ruled not to amend it. But they all said, that it was a great disgrace of justice that such cause should be overthrown without trial of the right, but they could not aid it. Palm. 123. Mich. 18. Jac. B. R. Holland v. Ley.

18. No Amendment shall be *after issue joined*, unless by rule of court, but otherwise while the plea is in paper; but then the others shall



shall have a long day to plead again, and good costs of common course, 2 Roll. Rep. 266. Mich. 20. Jac. B. R. Coniers. v. Coniers.

19. In *assault &c.* the plaintiff had a verdict. *No day or year was in the declaration entered on the imparlance roll, when the assault was committed, but a blank left for it; and the plaintiff's attorney by night got into the treasury, and filled up the imparlance roll with the day and year, the defendant's attorney having bespoke of the prothonotary a recordatur, which he was to have the next day, and this matter being discovered, it was moved, that the roll might be made as before, and resolved by all the justices, that it was amendable by the clerks, so as it be not on the ground of the action, until the recordatur entered, and after by the court, for it was only matter of form, and the court ought to amend it if it had not been done otherwise.* Lat. 164. Hill. 2 Car. 1 Sir Fran. Worsley's Case.

Het. 142. Worthly v. Savil, S. C. and judgment for the plaintiff. — Jo. 239. pl. 3 Worthly v. Savil, S. C. but S P. does not appear. — Litt. Rep. 278. Trin. 5. Car. S. C. adjudged for the

plaintiff nisi &c. — Raym. 53. in case of Herbert v. Paget, cites it as resolved in Ld. Saville's case. S. C. 4. Car. in C. B. that a record may be amended before a recordatur entered upon the Roll.

If the bill on the file be with blanks, or the imparlance roll be with blanks for dates or quantities, yet it may be amended by the paper by the clerks themselves, till a recordatur be ordered of the verdict returned on the nisi prius roll, but after such recordatur it can only be amended by the court, for the roll lies with the prothonotary to be made up according to the paper book till the recordatur of the verdict be allowed; but if after the recordatur be entered, it is ordered on the roll in statu quo, and then the court is supposed to take consueance of it in what manner it then was; and if clerks might afterwards alter the roll after entry of the verdict, they might amend it in the verdict which is in the nisi prius roll, and which was settled by the judges of nisi prius, and cannot be altered but by the rule of court. G. Hist. of C. B. 115. 116.

20. A writ of restitution was granted, directed to the lord mayor and court of aldermen, to restore E. to his place of common council-man of the city of London. After a return made and filed, whether upon motion or by the rules of the court, it cannot be amended; per Roll. Ch. J. Sty. 32. Trin. 23 Car. London (City) v. Estwick.

A return made to a *habeas corpus* and *certiorari* for the body of J. S. who was im-

prisoned for not paying a fine set at the quarter sessions, was filed, and it was afterwards prayed that it might be amended; but per cur. that cannot be after the filing, and so the party was discharged. Vent. 336. Pasch. 31 Car. 2 B. R. Anon.

The return of a commitment on a *habeas corpus* cannot be amended after it is filed. Gibb. 266. Pasch. 4 Geo. 2. B. R. the King v Catterall.

21. Commissioners of sewers made certain orders against A. which were removed by certiorari into B. R. and upon motion to amend the return, the court said it could not be, because the return was made the term before. Sty. 85. Hill. 23. Car. the King v. Apfley.

22. After verdict for the plaintiff in debt upon bond, judgment was entered quod recuperet the sum *pro misis & custagiis*, where it should be *pro debito prædicto*; but this was ordered to be amended as the default of the clerk, though in another term, the court having power over their own entries and judgments. Vent. 132. Trin. 23. Car. 2. B. R. Anon.

23. The court has power to amend any fault in a record during that term in which it was entered, though it be entered on the roll; per cur. 5 Mod. 148. Hill. 7 W. 3. B. R.

Ld. Raym. Rep. 183. Pasch. 9. W. 3. S. P.

per cur. — The court, during the same term, may amend any part of the roll, because it is in

in fieri, and such Amendments may be made *at common law* without the aid of any of the statutes. G. Hist. of C. B. 114.

24. It was moved to amend *an officer's name in a justification* and to strike out (*John*) and make it (*Anthony*), but because it was upon demurrer, and part of the fact, viz. who it was that took the cattle, the court held that it was matter of substance, and therefore not amendable. Ld. Raym. Rep. 310 Hill. 9 W. 3. in case of Britton v. Cole.

25. If the Defendant should join issue, the plaintiff may amend. *After error brought after verdict* he shall amend, or after a plea in abatement, because that is not final; per Holt Ch. J. but not *after demurrer*. Ld. Raym. Rep. 669. Pasch. 13 W. 3. Fox v. Wilbraham.

26. In a scire facias against bail, the defendants pleaded payment by the principal &c. the plaintiff replied, *Non solvit &c. & hoc petit quod inquiratur per patriam & prædicti defendentes similiter*. The defendant demurred, and the paper-book was made up without striking out the words (*prædicti defendentes similiter*.) The court held that it was a thing of course for the party that takes the issue to join the issue for the others, on a supposition that they will join in the issue to maintain what they have alleged, and therefore if they will not join in issue but demur, they ought to strike it out, and the leaving it in is a trick, and therefore the court gave leave to strike it out, though it was in another term, and after the cause came on in the paper. 2 Ld. Raym. Rep. 1337. Pasch. 4 Annæ, Stevens v. the Manucaptors of Hudson.

27. A *scire facias* recited, that whereas R. had recovered against J. whereas the judgment was that J. had recovered against R. It was moved *after error* brought to amend this, it being only vitium clerici in not pursuing his instructions. Holt Ch. J. said, if it was amendable before a writ of error brought, it is so after; and the court held it amendable. 11 Mod. 139. Mich. 6. Ann. B. R. Tulley v. the bail of Vavasor.

28. In debt on a bail bond, the defendant pleaded *comperuit ad diem*; it was moved to *amend the issue, in which the condition of the bail bond is misrecited*, and to make it agreeable to the bond, on payment of costs; which was granted accordingly. Rep. of Pract. in C. B. 26. Mich. 11 Geo. 1. Walpole v. Robinson.

29. In Indeb. Ass. the plaintiff counted as executor, and laid the promise as made to the testator. The defendant pleaded the statute of limitations. The plaintiff moved to amend by *laying the promise as made to the plaintiff*; sed adjournatur. It was objected, that this would alter the nature of the action, and that issue was joined, and notice of trial given, and so the application is too late. But afterwards the whole court granted the amendment; for though it varies the defence, yet it does not vary the nature of the action; for it only makes the declaration agree with the plaintiff's evidence. Gibb. 193. Hill. 4 Geo. 2. B. R. the Dutchess of Marlborough v. Wigmore.

30. A motion was made to amend the *entry upon record according to the Writs of scire facias and certiorari, and the returns thereof after issue joined upon nul tiel record*. The court held, that amendments ought to be made by common law without an act of parliament *where there is any thing to amend by*, and therefore ordered the entry upon record to be amended and made agreeable to the writs of scire facias and certiorari, and the returns thereof upon payment of costs, the entry being made imperfectly by *misprision of the clerk*. Barnes's Notes of C. B. 3. Mich. 6 Geo. 2. Hampson v. Chamberlain.

31. Declaration was moved to be amended on giving an imparlance; upon shewing cause it appeared that defendant had demurred, and given a *rule to join in demurrer*, and therefore plaintiff cannot amend on giving an imparlance, but *on payment of costs he may*. Barnes's Notes of C. B. 8. Mich. Geo. 2. Taylor v. Bramble. [ 320 ]

*In avowry for rent, the sum due was miscomputed, but leave was given to*

amend *on payment of costs*, though demurrer was joined, and the cause in the paper for argument. Barnes's Notes of C. B. 13. Hill. 11 Geo. 2. Harry v. Bant.

After argument upon demurrer plaintiff moved to amend the declaration, which was granted, *the merits of the cause not coming in question upon the argument, but only the form of pleading*. Barnes's notes of C. B. 14. Pasch. 11 Geo. 2. Farmer v. Burton.

But where after argument upon demurrer, and a rule for a further argument, defendant moved to amend his *avowry* by inserting 3 necessary requisites to justify his distress, the amendment was denied, *the former argument having been upon the merits, and there not being sufficient matter set out in the avowry to amend by*. Barnes's notes of C. B. 14. Trin. 11. and 12 Geo. 2. Woodman v. Inwen.

32. In replevin the defendant *avowed for rent arrear*, and set forth a demise of the locus in quo at 7l. per ann. payable quarterly, and that 11l. 4s. was in arrear for a year and three quarter's rent, and therefore the distress was made. The plaintiff demurred generally, because *no such sum as 11l. 4s. could be in arrear*, the cause was put in the paper and spoke to, and this mistake of 11l. 4s. instead of 12l. 5s. being insisted on, it went off, and now the avowant moved for leave to amend, and notwithstanding it had been once spoken to, the court made a rule for the amendment, on paying of costs. Rep. of Pract. in C. B. 148. Hill. 11. Geo. 2. Horry v. Bant.

*So in a Prohibition an amendment was made after the cause in the paper had been twice spoke to Ibid. in a note there, cites Mich. 8 Geo. 2. B. R. Middleton v. Crofts.*

## (I) By whom it may be done.

[ 1. *A Variance between the record of nisi prius and the original record may be amended as well in B. R. as in Banco, being by writ of error removed out of the Common Pleas. 20 H. 6. 15.]*

*Those things which are amendable before a writ of error*

*are amendable after a writ of error, and if the inferior court does not amend them the superior court may. 8 Rep. 162. a.*

[ 2. *If a Judgment be misenter'd in Banco through the default of the clerk, this may be amended in B. R. where the record comes by* Cro. J. 372. pl. 2. Wheadon.

v. Sugg by writ of error, as well as it could before in Banco. H. 13 Jac. S. C. and it B. R. between Wheden and Sugg, adjudged.] was ordered in B. R. to be amended there and judgment affirmed——Roll. Rep. 309. pl. 19. S. C. and S. P. agreed per cur.—Jenk. 338. pl. 87. S. C.—S. C. cited Arg. 2. Ld. Raym. Rep. 1059.

Error of a judgment in ejectment, and in the record a space was left for the costs not yet taxed. It was moved to amend it, for that the plaintiff had the liberty to get the costs taxed and to make the record perfect, it not being yet certified. Per Hale Ch. Baron, if it had been certified it might have been amended by rule of court, and if it should afterwards be removed, the court there must amend it; for the constant practice is, that if a record is moved out of C. B. into B. R. by error, and afterwards amended by rule of that court, it must likewise be amended in B. R. because it is in affirmation of the judgment, and therefore favoured in law. Hardr. 505. Pasch. 21. Car. 2. in Scaccarii, Friend v. Duke of Richmond.

A misentry of a judgment in Ipswich court was held per tot. cur. to be amendable [3. If a thing be misenter'd in an inferior court, which is amendable by the statutes, yet if a writ of error be brought, and thereupon the record is removed into B. R. or B. this shall not be amended \* there, because it is not usual to amend records in inferior courts. Mich. 9. Car. B. R. between Taylor and Norris, said per curiam to be the constant practice of the court.

by stat. 8 H. 6. which gives authority to amend records removed out of C. B. by error for faults which are per vitium scriptoris &c. and this statute extends as well in equity to the records of other courts which are not removed by error, whereupon it was awarded to be amended, and the judgment affirmed. Cro. E. 435 pl. 47. Mich. 37 & 38 Eliz. B. R. Vita v. Vita.

A plaint was levied in London by the name of Alderby, and the bail put in by the name of Adderly, but the declaration was by the name of Adderly, and all the recovery [record] pursued the declaration. After verdict for the plaintiff judgment was given Quod querens nil capiat per billam; but it was agreed that this was amendable in the proper court where the bail and declaration was entered, but not pleadable nor to be regarded in B. R. Mo. 407. pl. 548. Trin. 37. Eliz. Adderby. v. Boothby. —Cro. E. 458. (his) pl. 5. Pasch. 38 Eliz. B. R. Framson. v. Delamere S. C. the court thought it only the default of the clerk which perhaps might be amended here, if the record were in B. R. because it is but the variance of one letter from the plaint which is in nature of an original; but cannot now, the record not being there, and so they not lawful judges thereof. —Mar. 78. pl. 124. Mich. 15 Car. the court would not give way for amendments in inferior courts.

Error was brought in B. R. of a judgment in an inferior court, and the record removed contained a surmise, which never was made in the inferior court, but was contrived after the writ of error brought. And this appearing on examination, the court of B. R. ordered the town clerk to obliterate such surmise out of the record, and afterwards reversed the judgment. 2. Jo. 103. Pasch. 30 Car. 2. B. R. Harvey v. Holland.

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Fol. 210. [ 4. As in action upon the case in an inferior court after verdict and judgment for the plaintiff, a writ error is brought in B. R. where the record is certified that the defendant pleaded Non assumpsit & de hoc ponit se super patriam, & querens, \* scilicet for similiter without any dash through it; so that this is to be taken for scilicet rather than for similiter, and so no issue; and though this ought to be amended if it had been a writ of error upon a judgment in banco, yet this shall not be amended, it being certified out of an inferior court. Mich. 9 Car. B. R. between Norris and Taylor, adjudged, and the judgment given in Gravesend court reversed accordingly. Intratur Trin. 9 Car. Rot. 803.

G. Hift of C. B. 142. says that the inferior court from whence the record is returned, whether it be C. B. or any other court of record, may amend after judgment, as well after as before a writ of error brought; and the rule of such amendment is to be certified by the clerk of such inferior court to the superior; for though the record is removed by writ of error and a mittitur recordum is entered on the roll; yet the writ of error is to send the record in the state, and condition in which it ought to be by the law, and that is corrected, as it ought, from all misprisions of the clerks; for by the laws they are to correct the misprisions of the clerks before or after judgment; and such corrected records they are obliged to send, that the misprisions of the clerks may not be taken for their errors;

errors; and if they do thus correct the misprision of their clerks after the writ of error has been brought upon the record, it is proper to send up their clerks, who are the officers of the court, and have the custody of the records, or they may allege Diminution, and send up the record amended, as it ought to be, or it may be amended in the superior court, if the other refuseth; because such misprisions are not to alter the judgment; and therefore the court that superintends the inferior court, ought to correct the misprisions of the clerks of the court in the record sent to them.

\* This is here as it is in Roll, but it seems that it should be in the abbreviation that is to say (Sc̄) otherwise it cannot be any ways taken for (Similiter.)

5. The justices of C. B. *after writ of error* comes may amend the roll where judgment was given the same term, and it is entered contrary to the truth; for the roll is not the record in the same term. Br. Amendment, pl. 32. cites 7 H. 6. 28.

Br. error,  
pl. 68. cites  
7 H. 6. 28.

6. Note that every *bill in the chancery and elsewhere of debt between party and party*, by course of the common law there sued, ought to have the county or city where the cause arises in the teste or margin of the bill; and because bill was put in which wanted it, therefore it was amended after verdict, and in another court, viz. in B. R. quod nota. Br. Bille, pl. 35. cites 2 R. 3. 12.

7. If the sheriff or clerk makes misprision in the return, entry, or the like, the court may make *this clerk or another clerk* to amend it. And if the sheriff be after removed, or dead, yet they may make the *new sheriff* or his clerk, or the *old sheriff, if he be alive*, to amend it by the statute; quod nota. Br. Amendment, pl. 9. cites 33 H. 6. 42. per Prisot and Cur.

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8. A writ of *assise* was amended in the Exchequer-chamber before Portman and Whiddon justices of assise for Salop. Br. Amendment, pl. 72. cites 5 E. 6.

9. Error was brought in the Exchequer-chamber to reverse a judgment and a certiorari to remove the record; the error assigned was, that the *declaration on the file and the roll varied as to the number of closes*; the court differed as to its being amendable or not, but the rule of court was, that if it be amendable, the judges in the Exchequer are to direct the amendment of it. 2 Bulst. 149. Mich. 11 Jac. Ewer v. Chamberlain.

10. A Writ of error was brought to reverse a judgment given in C. B. and *after a certiorari and errors assigned*, they in C. B. amended the record. And by the whole court (Crooke only absent) they cannot do it; for after a *transmittitur*, they have not the records before them. And Barckley said, that the difference stands betwixt C. B. and B. R. and betwixt B. R. and the Exchequer. For the record remains always in this court notwithstanding a writ of error brought in the Exchequer-chamber; and therefore we may amend after. Wherefore the court said that if the thing were amendable, they would amend. But the Court of C. B. cannot. Mar. 72. pl. 109. Mich. 15 Car. Anon.

Palm. 198.  
199. 200.  
Trin. 19  
Jac. Anon.  
seems to be  
S. C. not-  
withstand-  
ing the  
difference  
of time;  
and see  
there these  
points de-  
bated. And  
Cro. J. 631.

pl. 5. Hill. 19 Jac. B. R. Mason v. Fox, Stephenson and Thorpe, seems to be S. C. but the point as to the time of the amendment does not appear there.

11. A plea was *Puis darrein continuance pleaded at the assises*, to which the plaintiff demurred, and the plea being certified on the back of the postea, the plaintiff gave a rule to join in demurrer,

2 Mod.  
307. Pasch.  
30 Car. 2.  
C. B. S. C.



but S. P.  
does not  
appear.

which defendant refusing, he entered judgment. The court held that the plea could not be amended here; but might, during the assises, be amended before the judge of nisi prius. Freem. Rep. 252. pl. 267. Pasch. 1678. Abbot v. Rugesley.

12. What is *not amendable* by the clerk *without order* of the court, if *done by him*; and if *according to law*, the court cannot alter, but may punish him. Skin. 46. pl. 18. Pasch. 34 Car. 2. in case of Birch and Lingen.

13. Misnomer was in a writ, and in all the after proceedings, as (Westly) for (Westby.) On motion the *curfitor* was ordered to attend, who satisfied the court the instructions were right, and so they ordered the original to be *amended in court*, and this without any application to Chancery, or order from thence, and they amended all the proceedings after. 2 Vent. 152. Hill. 1 & 2 W. & M. in C. B. Westby's Case.

### [ 323 ] (K) How, and what is to be done in Order thereto.

See (B) 3.  
4. 5. 6.

1. **W**HERE variance is, the *clerk who writ it*, or the *sheriff who returned it shall be examined*, and upon this found it shall be amended. Br. Amendment, pl. 67. cites 2 E. 4. 7.

2. Misprision of the clerk shall be amended, as in *debt upon an obligation*, if the *clerk of the chancery has the obligation*, or a copy of it, and varies from it, there upon examination of the clerk it shall be amended. Br. Amendment, pl. 78. cites 22 E. 4. 20.

### (L) Amendment by Statutes of E. 3. H. 5. and H. 6.

In *detinue of*  
3. *writings*,  
one of the  
writings  
was omitted  
in the *continu-*  
*ance*. It  
was held  
that all the  
process was

1. 14 E. 3. cap. 6. Enacts that by the misprision of a clerk in any place wheresoever it be, no process shall be annulled or discontinued by mistake, in writing one syllable or one letter too much or too little, but as soon as the thing is perceived by \* challenge of the party, or in other manner, it shall be hastily amended in due form, without giving advantage to the party that challenges the same because of such misprision.

discontinued notwithstanding this statute, which enacts the process shall be amended. 8 Rep. 157. a. cites 15 E. 3. Amendment 58.

In *Præcipe quod reddat* by John Martel of Sleaford, they were at issue, and in the *verdict* Sleaford was omitted, and the jury passed for the demandant, and this matter was alledged in arrest of judgment, and it was amended by the statute of 14 E. 3. B. R. Amendment, pl. 50. cites 39. E. 3. 21.

*Cosinage* of the Manor of Tybny-brooke, and the writ was of the Manor of Tybny and (brooke) was left out, and the opinion was, that it may be well amended, and yet the statute says, where syllable or letter is too much or too little in a word, but if part of the word be wanting, the word is wanting. Br. Amendments, pl. 18. cites 40 E. 3. 34.

Misprision of the clerk, where he made writ of execution of 100 pounds, where the roll was but 100 marks; and per Thorpe, the plaintiff shall not have it, \* [but] till 100 marks are levied. Br. Amendment, pl. 25. \* Br. Edegit, pl. 2. cites 44 E. 3. 10. S. C. and with the word (but.)



Trespass by Executor, and damages taxed by inquest to 100l. and the process was continued between such a one and another executor, and the roll was 100s. where it should be 100l. and it was challenged for discontinuance, & non allocatur; but the process was amended, and judgment for the plaintiff. Quod nota. Br. Amendment, pl. 24. cites 45 E. 3. 19.—Fitzh. Amendment. pl. 52. cites S. C.—S. C. cited 8 Rep. 157. a.

By this statute the justices had liberty on challenge of the party to amend the process where the clerk had mistaken one syllable or letter, and the judges afterwards construed the statute so favourably, that they extended it to a word, but they were not so well agreed, whether they could make these amendments as well after as before judgment; for they thought the authority touching that place was determined by the judgment; and therefore to put an end to the diversity of opinions by 9 H. 5. cap. 4 it is declared, that the judges shall have the same power, as well after as before judgment, as long as the record in process is before them; and this statute is confirmed by 4 H. 6. cap. 3. with an exception, that it shall not extend to process on outlawry. G. Hist. of C. B. 88.

\* Ld. Raym. Rep. 669. Pasch. 13 W. 3. it was said Arg. that those words (*Challenge of the Party*) must be understood of a demurrer; but Holt Ch. J. contra, that challenge of the party is for arrest of judgment.—1 Salk. 50. pl. 11. S. P. in S. C. by Holt Ch. J. accordingly.

2. By 9 H. 5. cap. 4. The justices before whom such plea or record is made, or shall be depending, as well by adjournment as by way of error, or otherwise, shall have power to amend such record and process, as well after judgment as before.

Several things may be amended before judgment, which cannot be amended after;

for then the party shall lose the advantage, and so it seems here, that where writ of error is justly given to the party, it shall not be taken from him. Br. Amendments, pl. 47. cites 9 E. 4. 14. per Littleton.

They may amend misprision as well after judgment as before upon examination of the sheriff &c. Br. Amendments, pl. 47. cites 9 E. 4. 14.

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Record may be amended after verdict, and after judgment. Br. Amendments, pl. 67. cites 2 E. 4. 7. per Choke.

Bill in Chancery of debt, leaving out the county in the margin was amended after verdict, and in another court. Br. Bille, pl. 35. cites 2 R. 3. 12.

3. 4 H. 6. cap. 3. Enacts, that the said statute of 14 E. 3. cap. 6. and also the statute of 9 H. 5. cap. 4. shall hold strength, force, and effect, in every record and process of the same as well after judgment given upon a verdict passed as upon a matter in law pleaded, provided not to extend to records and processes in Wales, nor whereby any person shall be outlawed.

Error was brought to reverse-outlawry in writ of debt, which was against J. B. of C.

Knight, and the capias was accordingly, but the alias, the pluries capias, and the exigent omitted the word (Knight) and this was assigned for error, and by the opinion of the court it may be amended by the Stat. of Leicester, as well after the record is removed for error as before. Br. Amendments, pl. 31. cites 7 H. 6. 27. — Br. Variance, pl. 60. cites S. C. \* The year book says this Stat. was made 3 H. 6. but it seems to be 4 H. 6. 3. by the words cited.

4. 8 Hen. 6. cap. 12. S. 1. For error in any record, process, or warrant of attorney, \* original writ or judicial, panel or return, in any places rased or interlined, or diminution found in any such record &c. which rasings &c. at the discretion of the judges of the courts, in which the said records and process, by writ of error or otherwise, be certified, do appear suspected, no judgment nor record shall be reversed or annulled.

In this Stat. you see that writ original is specially expressed, but the justices have no greater power by

this Stat. to amend writs than they had before, but after that judgment has been given &c. Thel. Dig. 224. lib. 16. cap. 6. f. 7.

Though the statutes (mentioned before) gave the judges a greater power than they had before, yet it was found that they were too much cramped, having authority to amend nothing but process, and they did not construe this word in a large signification, to comprehend all proceedings in real and personal actions, and in criminal and common pleas, but confined it to the mesne process and jury process; wherefore to enlarge the authority of the judges, this Stat. 8 H. 6. cap. 12. gives them power by them and their clerks to amend what they shall think in their discretion to be the misprision of their clerks in any record, process, and plea, warrant of attorney, writ, panel, or return. G. Hist. of C. B. 89.

There are only two statutes of amendments, viz. the 14 E. 3. and 8 H. 6. the rest are reckoned to be statutes of jeofails, and not of amendments, per Powell J. 1. Salk. 51. pl. 14. Mich. 3 Ann. B. R. in case of the Queen v. Tutchin.———And ibid. he held that the 8 H. 6. was only to enlarge the subject matter of 14 E. 3. and that 14 E. 3. extends only to process out of the roll, viz. Writs that issue out of the record, and not to proceedings in the roll itself; but that the 14 E. 3. extends not to the king, because of these words (challenge of the party.) And the Stat. 8 H. 6. has always been construed in imitation of the act of E. 3. and the exception in the Stat. of H. 6. was only ex abundanti cautela; and all judges and sages of the law in all ages have taken it not to extend to the crown. And the cases on the other side are not to be relied upon.

*S. 2. The judges of the courts, in which any record &c. shall be, shall have power to examine such record &c. and to amend in affirmance of judgments, all that in their discretion seemeth to be misprision of the clerk, except appeals, indictments of treason and felonies, and outlawries of the same, and the substance of proper names, surnames, and additions left out in original writs, and writs of exigent, according to the statute 1 Hen. 5. cap. 5. and in other writs containing proclamations; and if any record &c. be certified defective, otherwise than according to the writing which thereof remaineth in the places from whence they be certified, the parties, in affirmance of the judgments, shall have advantage to allege variance betwixt the same writing and the said certificate; and, that being found and certified, that same variance shall be by the judges amended according to the first writing.*

*S. 3. If any such record &c. shall be exemplified in chancery, and such exemplification there inrolled, without any rasing, then for any error assigned in the said record &c. contrary to the said exemplification and inrollment, there shall be no judgment reversed.*

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Quere, if this Stat. be in force in Wales or not. See the Stat. of the ordinances for Wales

*5. 8 Hen. 6. cap. 15. The justices before whom any misprision or default shall be found in any records and process hanging before them as well by way of error as otherwise, or in the returns of the same made by sheriffs, coroners, bailiffs or any other, by misprision of the clerks, or of the sheriffs &c. shall have power to amend such defaults and misprisions by their discretion, and by examination thereof by the justices; this statute not to extend to Wales, nor to processes and records of outlawries of felonies and treasons.*

made anno 27 H. 8. cap. 6. it seems that it is of force notwithstanding this proviso. Theil. Dig. 224. lib. 16. cap. 6. S. 9.

For further explanation of these statutes, see the proper divisions under this head.

### (M) Statute of 32 H. 8. cap 30.

*As the statutes before only ex-* *6. 32 H. 8. cap. 30. Enacts, that if any issue be tried by the oath of 12 men,*

tended to what the justices should interpret the misprision of their clerks, and other officers, it was found by experience, that many just causes were overthrown for want of form and other failings, not aided by those statutes, though they were good in substance; wherefore for the further relief of suitors this statute was made. G. Hist. of C. B. 89.

A judgment by *Nihil dicit* is not within the intent of the statute of jeofails, which speaks of verdicts; for this shall not be said a verdict; for a verdict is that which is put in issue by the joining of the parties; agreed per cur. Goldsb. 49. pl. 9. Pasch. 29 Eliz. Anon.

A judgment

A judgment given upon a *retraxit* is not aided by the stat. of jeofails as it would be if given on the verdict: Cro. J. 211. pl. 3. Mich. 6 Jac. B. R. between Beecher and Shirley.

It aids not discontinuances after *failure of record* on Nul tiel record pleaded. Cro. J. 303. 304. pl. 5. Trin. 10 Jac. B. R. Miles v. Pratt. ——— 11. Rep. 7. a. b. 8. a. cites S. C. adjudged accordingly.

This statute does not help *imperfect verdicts*. Arg. 2 Le. 196. in pl. 245. cites this case, An information was brought against B. for entry into a house, and 100 acres of land in S. he pleaded not guilty, but the jury *found him guilty as to the 100 acres, but said nothing as to the house*; thereupon error was brought, and judgment reversed, says it was a great case argued in the Exchequer, and was *RACHE'S CASE*, and Coke, who cited it said, that it was not a discontinuance, but no verdict for part. ——— Godb. 57. pl. 69. cites S. C.

*For the party plaintiff or demandant, or for the party tenant or defendant, in any courts of record, judgment shall be given,* In *Præcipe quod reddat* one is

vouched, who enters into the warranty and pleads to issue, which is misjoined, or other like default, and the issue is found against the *vouchee*, and judgment is given against him, he † may have writ of error notwithstanding the stat. 32 H. 8. cap. 30. by all the justices of C. B. For the statute does not provide for this case. For the *vouchee* is neither plaintiff or demandant, tenant or defendant. And. 26, 27. pl. 60. Anon. ——— Bendl. 37. pl. 67. Mich. 1 & 2 P. & M. Anon. S. C. that he shall have a writ of error ——— Kelw. 207. b. pl. 5. S. C. in totidem verbis. ——— S. C. cited 11 Rep. 6. b. ——— Hob. 281. S. C. cited by Hobart Ch. J. says, that he does not very well like the opinion in this case, for he says, surely the vouchee is a party both to the suit and issue; and the common law, (which is the mother and patron of reason to a statute) allows him a party to take a release from the demandant as well as the very tenant; but he is no party to the original writ, which, he says, is true that originally he is not, but by substitution of the party allowed by law, and he may plead in abatement, though he may also extort the warranty of the tenant, having not taken pleas in abatement; the statute says, plaintiff or demandant generally, not saying against the party tenant or defendant; and then why may not the 2 clauses for the tenant or defendant be enlarged to answer the reciprocal intent of the one number, rather than restrain the former by the latter, especially since it is clearly true that the issue found for the vouchee is found in effect for the tenant, and the demandant thereby clearly barred.

† Orig. is (cannot have) and so misprinted.

*Any mispleading, lack of colour, insufficient pleading, or jeofail,* *Where the bar or any other matter apparent in the record, as writ, count, replication, rejoinder, issue, process, or the like before the judgment is vicious,* this was cause to replead before the statute of 32 H. 8. Br. Repleader, pl. 14.

*Any miscontinuance or discontinuance, or\* misconveying of [ 326 ] process, misjoining of the issue,*

In writ of *account of divers receipts*, the defendant pleaded to issue to all but one, and as to that he pleaded nothing, and found for the plaintiff; it was moved that the plea was discontinued because he did not plead to that parcel according to 7 E. 4. 24. b. and 7. H. 6. 5. a. &c. and that this was not remedied by this stat. no answer being given as to one parcel, and the plaintiff cannot have judgment of part; for of the parcel to which no answer was made, no judgment can be given; but resolved and affirmed in B. R. that the statute extends to it by the words (*any discontinuance &c. notwithstanding*.) And judgment was given accordingly of so much as was found by the verdict. 11 Rep. 6. b. 7. a. cites Mich. 28 & 29 Eliz. B. R. Gomersal v. Gomersal. ——— Godb. 55. pl. 69. S. C. and S. P. argued, but no judgment. ——— 2 Le. 194. pl. 245. S. C. in totidem verbis. ——— Hard. 331. pl. 6. Trin. 15 Car. 2. in the exchequer in case of Workman v. Chappel, a difference was taken that where a plea is pleaded to the whole (as in the principal case there) and is *naught*, there ought to be a repleader, but where the plea was pleaded to part only as in the case cited 11 Rep. in Heydon's case, and so was a discontinuance, it is holpen by the statute after verdict.

In *replevin* the plaintiff was nonsuit after evidence and before verdict, but the jury gave a verdict for the damages; but the court held that this verdict for the damages is but in nature of an *inquest of office*, and therefore is a discontinuance not helped either by this stat. or that of 18 Eliz. a discontinuance after verdict would be. Cro. E. 339. pl. 4. Mich. 36 & 37 Eliz. B. R. Ireland's case. ——— Cro. E. 412. pl. 2. Mich. 37 & 38 Eliz. B. R. cites Busty v. Ireland S. C. and the S. P. was held there accordingly, Courtier v. Barret.

This statute helps all *discontinuances* as well after verdict as before; per Gawdy and Fenner J. Cro. E. 489. pl. 5. Mich. 38 & 39 Eliz. B. R. in case of Halman v. Collins. ——— Cro. E. 320. pl. 2. Pasch. 36 Eliz. B. R. in case of Walsh v. Wallinger, it was held by the justices that a discontinuance after verdict is not helped by any statute. ——— Cro. C. 236. in pl. 17. Mich. 7 Car. B. R. said e contra Arg. and seems admitted by the court.

**Trespass.** The *venire facias* and the *pannel* were wanting, but the *distingas jurat*, and the *pannel* annexed to it remained; it was adjudged to be helped by the statute. Cro. E. 259. pl. 43. Mich. 3: & 34 Eliz. B. R. Welsh v. Upton.

In an action of *battery and wounding*, the defendant justified as to the *battery*, but said nothing as to the *wounding*; the defendant had a verdict and judgment, because it was only a discontinuance upon the point of wounding, which is holpen after verdict. Hob. 187. pl. 227. Mich. 11 Jac. Freestone v. Bowyer.—G. Hist. of C. B. 128. 129. S. C.

In trespass for *entering into his house and his close*, the defendant justified; the plaintiff replied and traversed as to the *house*, but said nothing as to the *close*, and found for the plaintiff; but per tot. cur. judgment shall be for the plaintiff for that point which is found, and the discontinuance for the other is aided by the statute. Cro. J. 353. pl. 7. Mich. 12 Jac. B. R. Watts v. King.—4 Le. 57. Watts v. King is not S. C.—G. Hist. of C. B. 126. S. C.—Mar. 21. pl. 47. Pasch. 15 Car. Buckley v. Skinner of trespass cum equis porcis & bidentibus, and defendant justified as to the horses, but said nothing as to porcis & bidentibus. The book says the opinion of the court was that the plea was insufficient for the whole; and that Jones J. said that in such case the whole plea is naught, because the plea is intire as to the plaintiff; but that Barkley J. held the plea naught, quoad &c. only, and that judgment should be given for the other.—2 Roll. Rep. 161. Pasch. 18 Jac. B. R. JENNINGS v. PLAISTER S. P. and verdict for the defendant, and the court held it a discontinuance of this part of the action only as to what was not answered to, and the verdict shall stand good for the residue by the stat. 32 H. 8. and 18 Eliz. and the defendant had judgment.—Cart. 51. Hill. 17 & 18 Car. 2. Ayre v. Glossom S. P. Windham J. said it is a discontinuance in pleading, and that is helped by the statute; but Bridgman Ch. J. said that as to the question of discontinuance he was never satisfied in it; that discontinuance in pleading he thought is not aidable, but discontinuance in process is; and he doubted whether it was the intent of the statute; that in SIR JOHN BARRINGTON'S case a discontinuance in pleading was not helped; and that he had always been of opinion, and some of the judges seem to be of that opinion, that a discontinuance in pleading shall not be helped by the stat. of jeofails; and a *venire facias de novo* was awarded,

In debt for rent on a lease of lands, part freehold and part copyhold. The defendant pleaded an *eviction from all* by the plaintiff's testator; the plaintiff replied *prossando*, that the defendant was not evicted from the copyhold, *pro placito dicit*, that the freehold was intailed, and therefore the demise void. The defendant traversed the entail, upon which they were at issue, and the plaintiff had a verdict for the whole rent. It was objected that here was a discontinuance as to the copyhold, and it may be the greater part was copyhold; and if so, then the defendant is charged with the whole rent for the freehold, which is the lesser part. It was agreed that the rent issues out of the whole, but this discontinuance is cured by the stat. of H. 8. 3 Lev. 39. Hill. 33 Car. 2. B. R. Randall v. Brees.—2 Show. 399. pl. 371. S. C.—S. C. cited G. Hist. C. B. 126.

In debt on bond, after issue joined in a corporation-court the Mayor was removed, and another chosen, but no day was given to the parties, nor any other court held; but after this a *venire* was awarded, and the issue tried. Upon a writ of error brought in B. R. it was objected that the stat. 32 H. 8. cap. 30. did not extend to inferior courts, and that it helped only discontinuances of pleas or process, and not of the court. But per Holt Ch. J. it is a remedial law, and shall be construed to extend to all discontinuances, and that as well in inferior as superior courts; and indeed inferior courts have most need of such assistance. Gregory's case, which is of a penalty given by statute to be recovered in any court of record, which must be taken strictly for those at Westminster, differs for that is a penal law, and the courts at Westminster are those which the king's attorney-general attends. 1 Salk. 177. pl. 2. Trin. 3 W. & M. in B. R. Walwin v. Smith.—4 Mod. 86. Hill. 3 & 4 W. & M. the S. C. and the court was of opinion that discontinuances

[ 327 ] of process or in pleading was helped by the statute; but where the cause is discontinued, and out of court, as in the beginning of this reign, for not holding of Hilary-term all causes were then discontinued, which could not be aided by any statute of jeofails, without a particular act of parliament for reviving those causes and process.—Carth. 206. S. C. There was no dies datus, nor any court returned to be held in a quarter of a year together; but the return was, that such a day (so long after) the parties came into court, & superinde &c. But per cur. This being after a verdict the discontinuance is cured by the stat. of jeofails, which statutes do extend to inferior courts of record.—Idem. says the like judgment was given this term in a writ of error between Rolon and Phylor, where a discontinuance was assigned for error after a verdict and judgment in the court of the city of Exon, and the judgment was affirmed in both cases.—It was admitted Arg. that the stat. of jeofails do not extend to aid courts baron. Show. Parl. Cases 69. in case of Smith v. the Dean and Chapter of Paul's and Rugle.

\* Conspiracy against several, who pleaded not guilty, the plaintiff took one *venire facias* against all whereas he might have several *venire facias*'s, and the sheriff did not return the writ, by which the plaintiff took several *venire facias*'s against them, and after the jury passed, this was good matter in arrest of judgment before the statute of jeofails made anno 32 H. 8. but now it is not material after verdict upon issue by this statute. Br. Repleader, pl. 40.

An information upon the statute of usury was commenced in C. B. by subpoena, and upon issue joined it was found for the informer. It was moved, that the court is not to hold plea by process



process of subpoena, but by original, and that this is not aided by the statute of jeofails; for this is not a misconveying of process, but a disorderly award thereof; besides, it is not alleged in the declaration by whom, nor to whom, nor where, nor how much money was lent, nor against the form of what statute, and yet judgment was given for the plaintiff. And. 48. pl. 122. Mich. 16 & 17 Eliz. Topcliff v. Waller.—— D. 246. b. pl. 9. S. C. adjudged.—— Bendl. 251. pl. 269. S. C. with the objections, and says, that the process in this case is no more misconveyed than if a writ should be awarded in an ejectment, or a distress or attachment in a real action, and that these disorders were never meant to be remedied by the statute.—— Bendl. in Kelw. 214. a. b. pl. 17. S. C. with the same objections in French.

Error of a judgment in ejectment in Anglesey, because the venire was *quorum quilibet habeat*, & l. whereas the statute of 27 Eliz. cap. 6. extends not to Wales. It was the opinion of the court, it was no fault at common law, it being for the benefit of the parties to have the better trial, and if it be a fault it is helped by the statute of jeofails 32 Hen. 8. For that extends to all courts of records. Cro. E. 257. pl. 32. Mich. 33 & 34 Eliz. B. R. Morris v. Thomas.

Error of a judgment in debt, that the venire was awarded upon the roll Trin. 18 Eliz. returnable Mich. 18 & 29. Eliz. and the trial was by nisi prius 4 July before the return of it. It was the opinion of the court, because the jury is taken before the return of it, and so without warrant, it was ill, and not helped by the statute. Cro. E. 257. pl. 33. Mich. 33 & 34 Eliz. B. R. Calthorp v. Woodward.

In trover after verdict for the plaintiff it was moved that the *disfringis* with the *nisi prius* bore the same date with the *ven. fac.* but ruled that it was aided by stat. 32 H. 8. Mo. 623. pl. 852. Mich. 42 & 43 Eliz. B. R. Gumbleton v. Grafton.

Misconveyance of process is, where one writ is awarded in place of another to an officer that of right ought not to execute that process, and he returns it. This is helped after a verdict by the statute. But if a writ be awarded to an officer who ought not to execute that process, and he returns it, this is a mis-trial and not helped by the statute, and Warburton said, that Dyer, folio 367. [pl. 40.] to the contrary is not law. Brownl. 134. in case of Cradock v. Jones.

\* Lack of warrant of attorney of the party against whom the issue shall be tried, In trespass, the defendant appears,

ed by Higgins attornatum suum, and this being assigned for error, the court held it no appearance; for there may be diverse attornies named Higgins; but Wray said if there was any warrant of attorney, and his name appears there it may be amended, but not as it is. Cro. E. 153. pl. 32. Mich. 31 & 32 Eliz. B. R. Hill. & al' v. Mallet.—— Le. 175. pl. 246. Tempest v. Mallet. S. C.

This statute though much more extensive than the other, and though it very much enlarged the authority of the judges in amendments in mistakes, yet it remedied no omission but one, viz. that the party's own neglect in not filing his own warrant should not after verdict prejudice the right of the party that had prevailed; therefore to remedy the omission which the prevailing party might be guilty of, as well as the other side the stat. of 18 Eliz. cap. 14. was made. G. Hist. of C. B. 89. 90.

Or \* other negligence of the parties, their counsellors or attornies, Debt against husbandman, and the issue in the record was, if he was husbandman the day of the writ or not, and the record of nisi prius wanted these words (*dis brevis*) and yet the justices took the verdict, if he was husbandman the day of the writ; and at the day in bank, the plaintiff would have amended it by the statute according to the roll, which was well, and was not suffered; for as here the inquiry of the justices of nisi prius was without warrant, because it was not in their record, quere if it be aided now by the stat. of jeofails 38. H. 8. it seems that it is; for it is not the default of the party his attorney nor counsellors; but the default of the officers. Br. Amendment, pl. 82. cites 11 H. 6. 11. *J. N. of S.*

the \* judgment shall stand according to the said verdict, without [ 328 ] reversal.

If any default be in any original writ, or in the return thereof, or in the verdict, or in the judgment, or in the count, so that it plainly appears by the count that the plaintiff has no cause of action, and if a verdict and judgment is given upon such originals for the plaintiff, yet the defendant shall have a writ of error, notwithstanding this statute, and these defaults are not remedied by it. Bendl. 37. pl. 67. Mich. 1 & 2 P. & M. Anon.—— And. 27. pl. 60. S. P.—— Kelw. 207. b. pl. 5. S. C.—— but see 18 Eliz. cap. 14.

For further explanation of this statute, see the proper divisions of this head.

## (N) Statute of 18 Eliz. cap. 14.

The want of *vi & armis* 1. 18. *Eliz. cap. 14.* **I** *F any verdict of 12 men or more shall be given in any action in any court of record, the judgment thereupon shall not be stayed or reversed by reason of any default in form, or lack of form, touching false Latin or variance from the register, or other defaults in form in any writ original or judicial, count, declaration, plaint, bill, suit, or demand;*

was resolved to be but form, and not substance, and aided by this statute. Cro. J. 130. says a precedent was cited of Trin. 23 Eliz. Rot. 723. — S. P. held accordingly per tot. Cur. Cro. J. 443. pl. 19. Mich. 15 Jac. in the Exchequer-chamber, Taylor v. Welsted. — S. P. accordingly per. tot. Cur. Cro. J. 526. pl. 1. Pasch. 17 Jac. B. R. Willis v. Neilder. — S. P. and though it was in the writ, and in the 2d declaration, yet being omitted in the first declaration, is matter of substance, and cannot be amended; per tot. Cur. Cro. J. 526. pl. 3. Trin. 17 Jac. B. R. Ford v. Ford. — 2 Roll Rep. 107. S. C. accordingly. — Cro. C. 407. pl. 7. Pasch. 11 Car. B. R. S. P. accordingly, Mayo v. Coghill. — So in a *scire facias* on a recognizance for the good behaviour, the judgment was stayed after verdict, for want of *vi & armis*. Cro. J. 412. pl. 12. Mich. 14 Jac. B. R. The King v. Hutchins.

The meaning of this is, that the gist of the action must be substantially alleged; but any other circumstances relative to that action shall be supplied by the verdict; for it was not to the intention of the statutes perfectly to destroy the allegata; for this would have ruined all proceedings in the courts of justice; but the design was to cure any insufficiency that was not of the essence of the plaintiff's action. What is substance, and what not, must be determined in every action according to its nature, and that seems properly to be the essence of action, without which the court would have no sufficient grounds to give judgment in the same manner; that is of the essence of a plea, where the court has sufficient ground to dismiss the defendant on such plea found for him. G. Hist. of C. B. 97.

After verdict and judgment for the plaintiff in ejectment, it was assigned for error, that upon the *venire facias* is returned *Summonitus est*, where it ought to have been *Attachiatus est*; sed non allocatur, being only matter of form, which shall not hurt after verdict; and judgment was affirmed. Cro. C. 90. 91. pl. 13. Mich. 3 Car. in Cam. Scacc. More v. Hodges.

A plaint was entered against Francis, and the proceedings were against John; per Roll Ch. J. it is not good; for a plaint is in nature of an original writ, and therefore if that be erroneous, it cannot be helped, though after a verdict, and judgment nisi causa. Sty. 115. Trin. 14 Car. Brereton v. Monington.

In a common judgment in debt by confession *attachiatus fuit* was by mistake entered instead of *summonitus fuit*, and though the court at first made some difficulty, yet afterwards they made a rule to amend the record. Rep. of Pract. in C. B. 9. Trin. 1 Geo. 1. Rayner v. Arnold.

As to the want of *vi & armis*, see 16 & 17 Car. 2. cap. 8.

After a *venire facias* Or for want of any writ original or judicial,

was awarded in the exchequer, and returned, a *distringas juratores* was awarded, where it ought to be *habeas corpus*. This being assigned for error, all the barons and clerks held that this is the course of that court, and no *habeas corpus* ever was awarded in that court; and Wray said that it was the same in B. R. but that otherwise it is in C. B. and the course of the court must be pursued; besides it is aided by the statute of 18 Eliz. cap. 14. it being only a misawarding of process. Sav. 36. pl. 85. Mich. 24 & 25 Eliz. in the Exchequer-chamber, Venalio v. Woodroffe.

Error was assigned, that there was no *habeas corpus* or *distringas*; whereas the trial was by verdict, as was certified upon a certiorari awarded; but held that this is aided by the 18 Eliz.

"That after verdict judgment shall not be reversed for want of writ original or judicial;" but they all held; that if there never was a *habeas corp.* or *distringas* awarded, this

[ 329 ] shall not be aided by the statute; for then they had no authority to take the jury, and they could not know if they were the jurors returned upon the first writ; but it shall be here intended that there were such writs, because the jury was taken, and it cannot be intended that they would or could call them without such a writ, and so it shall be intended that there were such writs, but that they are embroiled, and this is directly aided by the statute. Cro. E. 215. pl. 10. Hill. 33 Eliz. B. R. Dampport v. Thatcher. — 1 Le 1. pl. 2. Thatcher v. Dampport, S. C. but S. P. does not appear.

After verdict it was moved in arrest of judgment, that the *venire facias* was returnable 3 days after the term, and the *distringas* awarded, and the jury taken thereupon, which was ill, because the first *venire facias* was ill. But per Gawdy, if there were no *ven. facias* it were helped by the statute



statute, but an *ill venire* upon the record is not helped. Cro. E. 605. pl. 2. Pasch. 40 Eliz. B. R. Worcester (Earl) v. Padden.

Where there is *not any writ at all*, it is aided by the 18 Eliz. but not where there is a good writ, but it *warrants not the declaration*; so if it be an *ill writ* it is not holpen by the statute. Cro. E. 722. pl. 52. Mich. 41 & 42 Eliz. C. B. Greenfield v. Dennis.—Same diversity per Cur. 5 Rep. 37. Pasch. 34 Jac. [but seems misprinted and that it should be Eliz.] B. R. Bishop's Case.—*Ec.* 210. pl. 295. Mich. 32 & 33 Eliz. C. B. Bishop v. Harcourt, S. C. but S. P. does not appear.—And 240. pl. 256. Pasch. 32 Eliz. S. C. but S. P. does not appear.—S. P. as to no writ, but a writ *insufficient in matter* is not holpen; but a writ *insufficient in form and sufficient in matter* is holpen; and in every writ of *formedon* there are two things requisite, viz. the gift, and the *conveyance to the demandant*, and if either of these fail, the writ is insufficient in substance, and is not holpen by the statute; per Popham Ch. J. Goldsb. 126. pl. 16. Hill. 43 Eliz. Downall v. Catesb.—Same diversity accordingly, between a vitious original and no original. Yel. 109. Mich. 5 Jac. B. R. per Cur. Harrison v. Fulstow.—Same diversity, 3 Bulst. 224. Mich. 14 Jac.—Same diversity, Sid. 84. Trin. 14 Car. 2. B. R. in pl. 12.

An *action was commenced* 35 Eliz. and the *venire facias* to try the issue was dated 33 Eliz. After a verdict this was assigned for error. Gawdy J. said that here is no *venire facias*, and so aided after verdict by 18 Eliz. But Tanfield said that this very case was York's case, and adjudged in this court that it was not holpen by the statute. Goldsb. 188. pl. 133. Hill. 43 Eliz. Boyer v. Jenkins.—*Mo.* 410. pl. 557. Trin. 37 Eliz. Bowyer v. Jenkins, is not S. P.

The *venire facias* was *John Percy*, and the *roll* was *Peter Percy*, and the *posita* was according to the roll, which was the plaintiff's true name. It was held, that in case no *venire facias* issues, it is holpen by the statute of jeofails; and in this case it is in effect as if no *venire facias* had issued, and so it was adjudged. Godb. 194. pl. 277. Trin. 10 Jac. C. B. Percy's case.—Brownl. 78. Milton v. Pearse, seems to be S. C. and the court held the *venire* as none.—So where the declaration and process was *Mathias W.* and the *venire* was *Matheum W.* Coke Ch. J. held this remedied by the statute; for if the christian name be mistaken, it is all one as if there was no *venire facias* which is remedied by the statute. Roll Rep. 22. pl. 30. Pasch. 12. Jac. B. R. Grubb v. Willoes.—Where no *venire facias* is, it is holpen by the statute; but an erroneous *venire facias* is not. Mar. 16. Pasch. 15 Car. pl. 60. Anon.

Case &c. The plaintiff *laid his action in Dorsetshire*, and afterwards *proceeded in London*, and had a verdict. It was resolved upon motion in arrest of judgment, that here upon the matter is want of an original, and aided by the statute of amendments. Palm. 394. Mich. 21 Jac. B. R. Cottrell v. Furnival.—2 Roll. Rep. 382. S. C. and the exception was not allowed. And Ley Ch. J. cited Culpepper's case, adjudged within a year before, where in trespass of battery bill was laid in Middlesex, and after declared in London, and verdict for the plaintiff; and upon motion in arrest of judgment, the court gave judgment against the plaintiff; but afterwards the same term upon better advice, they gave judgment for the plaintiff, because upon the matter there was a want of original, and therefore remedied by the stat. of amendments; and the reporter says he well remembered the case.—S. C. cited by the Ch. J. accordingly. Palm. 394.

In *ejectment* it was moved after verdict, that there was *no bill filed*, and the court said it was aided by the stat. of 18 Eliz. and therefore judgment was given for the plaintiff, notwithstanding the exception. Cro. C. 282. pl. 24. Mich. 8 Car. B. R. Parker v. Grigson.—Jo. 304. pl. 13. Griggs v. Parker, S. C. and resolved accordingly per tot. Cur. For the bill upon the file is in nature of an original, and want of an original is helped; and in the same manner the want of a bill, and judgment for the plaintiff.

In *trespass against 3*, one pleaded not guilty, upon which they were at issue, and the defendant had a verdict. There was judgment by default against the other 2, and a writ of inquiry, and they only brought a writ of error, and assigned for error the want of an original, and that this is not cured by the verdict for the one defendant; but it is now as if the action had been brought against the 2 only; but if the verdict had been for the plaintiff against that one defendant, this had been aided by the statute; for the want of an original quoad all is cured, where any verdict is for the plaintiff, and the other 2 may bring a writ of error without the 3d; for he cannot be joined because he is acquitted, and therefore cannot say that the judgment is to his damage; and so held all the court except Twisden, who held that the writ of error should be brought by all three. Lev. 210. Pasch. 19 Car. B. R. Cannon v. Abbot.

The court took a diversity between *no venire facias* at all, and an *ill venire*; for though it be as bad as may be, yet since it is a *venire facias* it is not helped by the stat. of jeofails; but if there had been none, the statute had made the trial good without it; and accordingly judgment was afterwards affirmed. Stry. 8. Hill. 22 Car. B. R. Broome v. Evering.—S. P. by Gawdy J. Cro. E. 605. in pl. 2.

In *ejectment by original* in B. R. it was moved in arrest, that the original was *summonitus fuit*, &c. whereas it should be *attachatus fuit*, viz. *Pone per vadios* &c. it being an action of trespass, and that an *ill original* is not aided. After search made, and no original writ being to be found upon the file, the court said they would intend after verdict that there was a good original, which now is lost, and that the plaintiff's clerk had mistook in the recital thereof; but had there been a vitious original upon the file, they would not intend another good original, unless the plaintiff shewed it, and judgment for

the plaintiff. *Saund.* 317. *Mich.* 21 *Car.* 2. *B. R.* Redman v. Edolph.——*Sid.* 423. pl. 3. S. C. but no judgment.——*Mod.* 3. pl. 12. S. C. and it being certified by Mr. Livesey that there was no original at all, the plaintiff had judgment, though in his declaration he recited the original.——*G. Hist. of C. B.* 96. cites S. C.

*Ven. facias*  
was awarded

*Or by reason of any imperfect or insufficient return of any officer,*

*ded to and returned by the coroner, and afterwards a talcs was awarded and returned by the sheriff, and a verdict was given. This is not aided by the stat. 32 H. 8. or 18 Eliz. and judgment reversed. Cro. E. 574. pl. 15. Trin. 39. Eliz. in the Exchequer-Chamber, Morgan v. Wye.——Mo. 356. pl. 482. S. C. adjudged accordingly; though Dyer 367. [a. pl. 40. Mich.] 21 & 22 Eliz. says it was held that it was remedied after verdict by the stat. 32 H. 8.——But 5 Rep. 36. b. this case being cited as the case of Goodwin v. Franklin, by Wray Ch. J. accordingly, the reporter, says Wray, said true; for he was of counsel with Franklin in the case; but the principal case in Dyer was held good law, because the venire facias was awarded *ex assensu partium, & omnis assensus tollit errorem.*——See Trial (H. e.) pl. 19.*

In dower the *venire facias* on the roll was awarded returnable 15 Pasch. but the writ itself was made returnable 15 Trin. and so no venire facias warranted by the roll. This is within the 18 Eliz. and judgment shall not be stayed for such misprision after a verdict. *Cro. E.* 758. pl. 28. Pasch. 42 Eliz. *C. B.* Ford v. Rider.

*Venire facias* was awarded returnable upon the roll *die Sabbati post 15 Martini*, and the writ itself was returnable *die Jovis post 15 Martini*, so as it varies from the roll and is not warranted thereby. But the court held it to be no error; for in regard a *disfringas* was awarded upon it, and the trial is upon the *disfringas*, the verdict is good; and if not, it is holpen by the stat. of 18 Eliz. of misawarding of process, wherefore the judgment was affirmed. *Cro. E.* 767. pl. 7. Trin. 42 Eliz. *B. R.* Parks v. Jackson.

Error of a judgment in debt in *Norwich*, for that the record was *attachatus est*, where it ought to be *summonitus est*; for that ought to be as an original, and for want thereof it is error. It was objected that the defendant having appeared and pleaded to issue, and verdict and judgment given, it is not now assignable for error; for it is but the want of an original which is aided by the stat. of 18 Eliz. But Popham and Williams only in court, held it is not aided; for that statute is intended only of original writs, which are sued out of chancery returnable in C. B. or B. R. but extends not to process, which is only in the nature of an original; and the judgment was reversed. *Cro. J.* 108. pl. 4 Hill. 3 Jac. *B. R.* Pratt v. Dixon.

After verdict and judgment it was assigned for error, that there was no return upon the *habeas corpus*, and so *album breve*, and therefore not aided by the statute; for this is all one as a venire facias. *Quod fuit concessum per Coke.* Roll. Rep. 295. pl. 13. Hill. 13. Jac. *B. R.* Buckle v. Scarth.

Judgment  
against the

*Or for want of any warrant of attorney,*

principal, and a *scire facias* and judgment against the bail by nil dicit; and upon error brought it was assigned for error, That there was no warrant of attorney filed for the plaintiff; adjudged that this was not within the stat. of 18 Eliz. For that helps only after a verdict, and where there is no warrant of attorney, but not after a judgment by confession, or non sum informatus; and here being no warrant of attorney, the court cannot order the making one; but if there had been one, they might have ordered the filing it. Mar. 121. pl. 201. 129. pl. 209. Mich. 17 *Car.* Fairborn v. Cruso.

\* After a  
verdict and  
judgment it

*Or by reason of any \* default in process, upon or after any aid or voucher.*

was assigned for error, that there were no continuances from Easter to Michaelmas term. Adjudged this was error, and not helped by this statute, though it was after a verdict, because that statute must be intended where the judgment is had upon a verdict, which was not done in this case but upon defendant's confession of assets, and the verdict was nothing to the purpose, but only to make the defendant's confession more strong. *Brownl.* 106. Hill. 7 Jac. *Mollineux v. Mollineux.*——*Cro. J.* 236. pl. 7. S. C. accordingly; and the stat. 18 Eliz. is to be intended when the trial by verdict is the occasion and cause of the judgment.——*Yelv.* 169. S. C. accordingly, and *Brownl.* seems only a translation of *Yelverton.*

A writ of  
revisement  
of ward ac-  
cording to  
the statute  
of Westm.

S. 2. This act shall not extend to any appeal of felony or murder, nor to any indictment or presentment of felony, murder, treason, or other matter, nor to any process upon them, nor to any action upon any popular or penal statute.

3. cap. 35. is a penal law as was agreed by all the judges, and 3 of them held that it is such a penal

penal law as was within the proviso of this statute, but Haughton J. *contra*; he agreed it to be within the letter, but held it to be out of the exception which intends such actions as the king may have and a subject too, so as they are partly popular and partly penal as upon the statute of *perjury* which gives action to the party grieved, this is penal, because a certain pain is inflicted by that statute, and given to the party grieved; but a statute that gives recompence to the party who hath sustained damages as action of *waste*, which is for a wrong done in the land, and so of *forcible entry*, and upon the statute of 2 E. 6. of *riber*, because these are remedies given for the party's right, and so not within this proviso; but if it be a pain set and imposed without any respect of recompence for damages, then it is within the proviso. 3 Bull. 275. &c. Hill. 14 Jac. *Hussy v. Moor*.——Roll Rep. 445. pl. 9. S. C. and *ibid.* 447. 448. S. P. accordingly by Haughton J. and as to the action of waste and upon the 2 E. 6. of tithes, the same were agreed *per tot. cur.* But as to the principal case of *ravishment of ward Mountague*, Crooke, and Dodderidge seemed *e contra*, because it is not an action given only in satisfaction of damages, but also imprisonment and banishment are added to punish the tort; but Crooke and Dodderidge agreed, that if this action had only increased the damages it had not been within the proviso, because then it would be in satisfaction. And Crooke said that an action of *forger of false deeds* is within this proviso, because of the corporal punishment.——Hob. 101. S. C. and S. P. accordingly.——2 Saund. 258. in case of *Greene v. Cole*, the reporter infers from that case that an action of *waste*, though treble damages are recovered therein, is not such penal action as is excepted out of the 21 Jac. [cap. 13. where there is the like proviso as here.]

\* If in debt on the statute of 2 E. 6. there had been any mispleading, or mistrial, the court held clearly that it was aided by 32 H. 8. and 18 Eliz. cap. 14 and cannot be quashed after verdict. Cro. J. 318. pl. 1. Hill. 18 Jac. B. R. in case of *Arnold v. Bidgood*.——2 Bull. 66. S. C. accordingly.

For further explanation of this statute, see the proper divisions under this Head.

### (O) Statute of 21 Jac. 1. cap. 13.

21 Jac. ENACTS, that after verdict for the plaintiff or cap. 13. demandant, or for the defendant or tenant, bailly in assise, vouches, prayes in aid, or tenant by receipt, in any court of record, the judgment thereupon shall not be staid or reversed by reason of any variance in \* form only, between the original writ or bill and the declaration, plaint, or demand, or lack of an averment of any life of any person, so as upon examination the person be proved to be in life,

\* See the first note upon the statute of 16 & 17 Car. 2. cap. 8. In ejectment the plaintiff declared of a lease for 3

lives, if A. so long lived, but did not shew that A. was alive. This being moved in arrest of judgment, the court held that being after verdict it is made good by the stat. 21 Jac. cap. 13. if cessly que vie be yet alive, which may be examined by the sheriff &c. Sid. 61. pl. 30. Mich. 13 Car. 2. B. R. Anon.——Keb. 176. pl. 137. *Tubb v. Walwin*, S. C. says the inquiry may be by the sheriff, or other, as the court thinks fit. And Foster cited *Lady Morley's case*, where after verdict the like rule was made before the statute.

2. Or by reason that the *venire facias*, *habeas corpora*, or *distingas* is awarded to a wrong officer;

*Venire facias* and other process

were directed *vicecomitis de Cantuarij*, and the return is made by one sheriff only; but upon advisement the court amended it at common law, and not upon the statute of jeofails; but upon the 39 H. 6. Fol. 40 viz. they swore the sheriff here in court, that there was only one sheriff in *Canterbury* and then made an indorsement on the writ accordingly, viz. that there was not any other sheriff. Sid. 244. Pasch. 17 Car. 2. B. R. *The King v. Percival & al.*

3. Or by reason the *visne* is in some part misawarded, so as some que place be right named, or by reason that any of the jury is misnamed, so as upon examination it be proved to be the same that was meant;

The statute of 21 Jac. aids only where the *venire facias* is from

one place where it should be from two, or *e converso*; but not where there is no place from whence the *visne* should come; per Dodderidge & Whitlock J. Lat. 194. Hill. 1 Car. in case of *Taylor v. Tolwin*.

This statute aids not *mistrial* only in two cases; 1st, It aids not but where the *venue* ought to be from several places. 2dly, or where one of the places is truly named; per the Ch. J. Sid 20. pl. 1. Hill. 12 Car. 2. C. B. in case of Hill v. Bunning.

In an action of *waste* brought in London the *venire facias* was awarded to the beaules of 4 wards. After verdict and judgment, it was moved and resolved that the verdict and judgment were erroneous because it was awarded at the petition of the defendant to the beaules of 4 wards, which are not said to be the next wards to the place wasted, and that 2 of them do not appear to be so, and so it was a trial not according to the custom. But upon error brought in parliament, it was resolved by the major part of all the justices and barons, that though it was a wrong *venire*, yet it was aided by the 21 Jac. 1. cap. 13. For 2 of the said wards appear to be next to the place wasted, and so the *venire* was misawarded in part only, and so the lords affirmed the judgment. 2 Saund. 252. &c. Mich. 22 Car. 2. Greene v. Cole. — From hence the reporter infers and says, Ex hoc nota, that the said statute extends to inferior courts and is not restrained to the courts of Westminster. 2 Saund. 258. in case of Greene v. Cole. — Ibid. the reporter says, he thinks it doubtful whether the case be aided by the said statute 21 Jac. or not, for the statute extends only to aid those proceedings, which were at the common law, where the *venire* was mistaken in part, by the award of the court; but when an issue is not to be tried by a jury de vicineto of the place where the issue ariseth according to the common law, but is to be tried by a jury of 4 wards adjoining, according to a special custom, which would be erroneous at the common law, (the *venire* not being awarded de vicineto) unless it was supported by a special custom; then when the custom (which takes away the common law) is not pursued, methinks the statute doth not extend to aid it; but it was adjudged ut supra &c.

Debt against the heir upon a bond of his father, he pleaded *riens per descent* besides a reversion of lands in Herefordshire and Worcestershire expectant upon the death of J. S. An issue was taken and tried by a jury of Herefordshire, and after a verdict for the plaintiff, it was moved in arrest that this was a *mistrial*, for it ought to have been tried by both counties, and upon this judgment was stayed. 2 Lev. 178. Mich. 28 Car. 2. B. R. Hore v. Ld. Dorset. — The reporter adds a nota, that this seems to be cured by the statute 21 Jac. which says that it shall be well where the *venue* is of one place, when it ought to be of more, and does not say in the same county, so that it may well extend where the places are in several counties. Quere de eo. Ibid.

In a writ of error upon a judgment in  
4. Or by reason that there is no return upon any of the writs, so as a panel of the names of jurors be returned, and annexed to the writ;

the palace-court at Westminster, the error assigned was, that the *habeas corpus juratorum* was not returned served, but only a pannel of the names annexed to it. It was objected, that the statute extends only to such as are by writ, and in this court it is by precept, and not by writ; but adjudged, that it is within the intention of the statute, which provides amendment in any action, suit, plaint &c. All. 64. Pasch. 24 Car. B. R. Morefield v. Webb. — Sty. 39. S. C. but S. P. does not appear.

It was agreed that the statute of jeofails  
5. Or for that the sheriff's name is not set to the return, so as upon examination it be proved that the writ was returned by the sheriff &c.

which provides amendment by examination of the clerks &c. shall not extend to inferior courts in these points. All. 64. Trin. 24 Car. B. R. in case of Morefield v. Webb.

This statute helps after verdict where the  
6. Or by reason that the plaintiff in an *ejectione firmæ*, or in any personal action, being an infant, did appear by attorney, and the verdict pass for him.

plaintiff is within age, and sues by attorney, but not where he is defendant. Jenk. 301. pl. 68. Trin. 18 Jac. Stone v. Marsh. — Bulst. 24. S. C. & S. P. accordingly, where he is plaintiff. — Cro. J. 580. pl. 11. S. C. where he was plaintiff, but the court would advise. — But where he was defendant the judgment against him was reversed. Cro. E. 569. pl. 5. Trin. 39. Eliz. B. R. Sedburrough v. Raunt. — Cro. J. 581. cites S. C. that the infant defendant confessed the action by attorney.

If an infant appears by attorney where he ought to appear by guardian, it is error, and not helped by the stat. 21 Jac. because it is more dangerous for an infant to appear in propria persona, or per guardianum than by attorney; for against an attorney he may have remedy, but not against himself or his guardian; and this is casus omissus out of the statute; per Roll Ch. J. Sty. 218. Trin. 1650. in case of Dawkes v. Payton.

7. This

7. This statute extends to courts made after. Resolved in error on a judgment given in the palace-court at Westminster, which was erected by letters patents 6 Car. and upon good deliberation judgment was affirmed. All. 64. Pasch. 24 Car. Morefield v. Webb.

The statutes made before were only extended to the courts above, but

the subsequent statutes carry to all courts of record, and remedy several defects and omissions not included in the former jeofails. G. Hist. of C. B. 90.

8. S. 3. This act shall not extend to any appeal of felony or murder, nor to any indictment or presentment of felony, murder, or treason, nor to any action upon any popular or penal statute.

[ 333 ]  
One was sued upon

the statute of inmates, and the *distringas jurata* bore date on a Sunday, and out of term; Roll Ch. J. held that the statutes 18 Eliz. and 21 Jac. extend not to penal laws, although it is ambiguously penned, nor to any processes grounded upon them, for the proviso exempts the original action, and by consequence all processes depending upon it are excepted, so that here is no good trial, but there shall be a ven. fac. de novo, nisi. Stry. 307. Mich. 1651. Theoballs v. Newton.

Information of perjury is not named in this proviso, and therefore remains at common law. Sic dictum fuit. Sid. 66. pl. 39. Mich. 13 Car. 2. B. R. in case of the King v. Reede.

An information for a riot and battery upon one of the king's messengers in his journey is not within this proviso, but remains at common law. Sid. 243, 244. pl. 4. Pasch. 17 Car. 2. B. R. the King v. Percival & al.

For further explanation of this statute, see the proper divisions under this head.

## (P) Statute of 16 & 17 Car. 2.

1. 16 & 17 Car. 2. cap. 8. S. 1. If any verdict be given in any action or demand in his majesty's courts of Westminster, or in the counties palatine, or in the great

sessions, judgment shall not be staid or reversed for default in form, or by reason that there are not \* pledges, or but one pledge to prosecute, returned upon the original writ; or because the name of the sheriff is not returned upon such original writ; or for default of entering pledges upon any bill or declaration; or for default of alleging the bringing into court any bond, bill, indenture, or other deed mentioned in the declaration or other pleading; or for default of allegation of bringing into court letters testamentary, or letters of administration; or by reason of the omission of † vi & armis, or ‡ contra pacem;

The main design of the stat. 21 Jac. cap. 13. was to help any mistake in the jury process; but there were several things still to be supplied, and several others to be ad-

judged form which are always construed to be matters of substance, and consequently not aided by any of the former statutes, wherefore 16 & 17 Car. 2. cap. 8. was made. G. Hist. of C. B. 91.

¶ Matter of substance is whatever is essential to the gist of the action; for it was not the intent of the statute of jeofails to supply a thing that is essential to the action that is not put in issue, it might have been found against the plaintiff, and a verdict will not help that which was never put in the issue; for the action may be ill founded notwithstanding that verdict, if something essential to maintain the plaintiff's action was not put in issue; but if the verdict be upon a matter collateral to the plaintiff's action, and all the essentials to the action are well alleged, there no advantage can be taken, because when the cause is tried the whole weight of it is put in the point in issue; and where the parties had been at the expence of a trial, it was the intent of the statute that the verdict should determine the cause, and the wrong pleading of such collateral matters should not turn to the disadvantage of any of the parties; for the benefit of such collateral matters are waived, when they have put the stress of the controversy on the point in issue. G. Hist. 109. 110.

As if trespass be brought for chasing the plaintiff's beasts, the defendant says the place where &c. is this franktenement. The plaintiff prescribes for common pro magnis averiis in the place where,



where, Levant and Couchant in Dale. The plaintiff in his replication does not shew they were magna averia, or † that they were Levant and Couchant in Dale; yet if the prescription be in issue, and that be found for the plaintiff, he shall have judgment, because the issue being on the right of common, which is collateral to the injury done by the beasts, and the right being found for the plaintiff, the defendant has waived all other benefit of the replication, and therefore the statutes hinder him from taking any benefit after verdict; for the defendant by his issue confesses the injury in chasing the beasts, if there be no right of common, and waves the advantage he might have taken on demurrer for the plaintiff's not bringing himself within the prescription of what was essential, to shew an injury in chasing the beasts. G. Hist. of C. B. 110. 111.—See Saund. 226. Pasch. 20 Car. 2. Stennel v. Hogg, S. P.

† S. P. held aided by the statute of jeofails, and judgment for the defendant. Cro. J. 44. pl. 12. Mich. 2 Jac. B. R. France [or Prance] v. Tringer.—S. C. cited Ld. Raym. Rep. 168.—S. P. and aided after verdict. Vent 34. Trin. 21 Car. Br. Anon

**[ 334 ]** In case for words by attachment of privilege, the defendant demurred to the count for want of pledges. Per Cur. this is substance, the defendant having demurred specially for this cause, and the plaintiff having joined in demurrer, and put this specially on the court; so that though otherwise pledges may be found at any time pending the plea yet not now after demurrer joined, but [judgment] shall be given against the plaintiff. But afterwards on the importunity of counsel and payment of costs, the declaration was amended and pledges entered. 3 Lev. 39. Hill. 33 & 34 Car. 2. C. B. Hardy v. Gilding.

In debt upon a judgment obtained 34 Car. 2. setting forth the said judgment &c. *sicut per recordum* &c. *processum inde remanen* in eadem curia nuper domini regis coram ipso rege apud Westm. plenius Equet. The defendant demurred, for that he should have declared Coram ipso nuper rege apud Westm. *sed jam coram dom. rege nunc* &c. *plenius liquet* &c. The court held it was but matter of form, but being upon a demurrer, it was not amendable. 3 Mod. 235. Trin. 4 Jac. 2. B. R. Franchaw v. Bradshaw.

In debt on bond by J. A against J. B. for payment of 50 l. to E. such a day, and to indemnify the plaintiff, who was surety for the defendant in another bond to E. for payment of the same sum, the defendant pleaded Solvit ad diem, and the plaintiff replied quod prædict. J. B. non solvit prout idem J. B. superius allegavit, & hoc petit quod inquiratur per patriam & prædict. J. B. similiter. After verdict for the plaintiff, the defendant (upon whom the issue lay) having made no defence, it was moved in arrest that they relied on the misprision, and therefore made no defence; and that the stat 17 Car. 2. cap. 8. extends not to this case; for that aids a mistake of the name where plaintiff or defendant has been right named before only, where that might be shewn for cause of demurrer, which could not be done here; and to this the court agreed; but they held it amendable by stat. 8 H. 6. and it was amended. Comyns's Rep. 250. pl. 139. Trin. 2 Geo. 1. C. B. John Abraham v. John Burn.

\* See Tit. Pledges.

† See Tit. Facts (M. 2.) &c.

‡ See Tit. Trespass (Q. 2. 3) (Q. 2. 4)

§ See Tit. Trespass (Q. 2. 5)

\* See tit. record (O)

2. Or the mistaking of the christian name or surname of the plaintiff or defendant, *demandant or tenant*, \* sums of money, day, month, or year, by the clerk, in any bill, declaration, or pleadings, where the right name &c. in any record preceding, or in the same record, are once rightly alleged, whereunto the plaintiff might have demurred; and shewn the same for cause; nor for want of the averment of Hoc paratus est verificare, or Hoc paratus est verificare per recordum; or for not alleging † Prout patet per recordum; or for that there is no right ‡ venue, so as the cause were tried by a jury of the county or place where the action is laid,

§ See tit. Trial (H. 2.) &c.

Debt in London on a bond conditioned for enjoyment of a walk called Shrub-walk in Whittlewood Forest in the county of Northampton, and the venue was of Shrub-walk, and the cause was tried in Northampton. After a verdict for the plaintiff it was moved, that here was a mis-trial, because the venire facias could not come from a walk in a forest, † which is only an office or liberty, and the court inclined that it was not aided by the 16 & 17 Car. 2. but afterwards all the court besides Twisden held it within this statute; and as to the words in the statute, viz. (county where the action is laid) they construed it to be (the county where the issue is triable) and so though all agreed that ven. fac. cannot be of a walk, especially here it being named only collaterally as an assignment of a breach of covenant, and not as a lieu conus, but that it ought to have been from the forest, yet it is aided by this statute, and judgment for the plaintiff. Sid 325, 326. pl. 5. Pasch. 19 Car. 2. B. R. Strike v. Banes.—† Lev. 207. Deirby v. Bates, S. C. adjudged accordingly by all but Twisden, that being tried by a jury of the county



county where the matter in issue arose it is within this statute, and that it would destroy all the law touching juries to try it in a county foreign to the issue who could not know any thing of it; and the rather, because the statute says further, that (*in this and other like cases &c.*) and here the action being laid in London is well tried in the county of Northampton where the matter in issue is.

In *covenant*, the action was laid in London, and issue was joined upon a *feoffment* in Oxfordshire of lands in that county, and the cause was tried in London. After a verdict for the plaintiff it was moved in arrest of judgment, that this was a mis-trial, because a feoffment of lands in Oxfordshire is local, and therefore the cause ought to have been tried there; sed per curiam, this is helped by statute 17 Car. 2. being tried in the county where the action was brought. 3 Salk. 364. pl. 13. Anon.

In *covenant for non-payment of rent upon a demise of allom works* [in Lancashire] defendant pleaded that plaintiff inclosed the mines so that he could not enter to work them, and issue thereupon was tried in London, where the covenant was alleged to be made. After verdict defendant moved, that this was a mis-trial; but whether it was aided by 16 & 17 Car. 2. cap. 8. curia advisare vult. 2 Jo. 82. Mich. 29 Car. 2. B. R. Aynsworth v. Chamberlaine.——3 Keb. 654. pl. 7. S. C. the court divided, & adjournatur.——Ibid. 675. pl. 46. S. C. the court divided, & adjournatur.——Ibid. 691. pl. 17. Aynsworth v. Champion, S. C. per Cur. this is not aided by the 16 & 17 Car. 2. cap. 8. which never intended to oust the jurisdiction of the county palatine, [in which it seems according to 3 Keb. 654. the lands lay] and judgment stayed, Wyld presentor, [who with Twisden before held the contrary.]

*Seisin of lands in Kent, Cambridgeshire, and Hertfordshire*, was tried in London where the action was brought, and found for the plaintiff, and this being assigned for error, the court seemed to incline that it was well enough after a verdict by the statute 16 & 17 Car. 2. cap. 8. sed adjournatur. Raym. 392. Trin. 32 Car. 2. B. R. Horton v. Nanfan.

A trial was in Middlesex, and on a traverse in Surrey, and this moved in arrest of judgment, and Holt of opinion to stay judgment for that a wrong county is not remedied by the statute, but only a wrong venue in a right county; but Dolbin, Gregory, and Eyres J. e contra. And Eyres said, if it had been res integra he should be of another opinion, but all resolutions being otherwise he accorded. 12 Mod. 7. Trin. 3 W. & M. Chew v. Briggs.——S. C. cited 3 Lev. 394. Pasch. 6 W. & M. in C. B. and said to have been determined the last term in the Exchequer chamber, by the opinion of 4 justices against 3, that it was cured by the new statute; and therefore in the principal case there, which was HUNT'S CASE, and was debt for rent in London of lands in Essex, the defendant as to part pleaded nil debet, and as to the residue an entry and expulsion; whereupon issue and verdict for the whole intirely and damages, and it was moved that the issue as to the expulsion was local to be tried in Essex, and therefore the verdict intire for debt and damages ill in toto but by reason of the case of Briggs v. Chew above the court would not reverse the judgment in the principal case, but affirmed it, though (as the reporter observes) some of the most considerable judges now there, and also the 3 in the other court being also the most considerable were of the contrary opinion; but that in both cases the judgments were given per majoritatem numero, non pondere.

In debt in Middlesex on a bond conditioned to pay 50 l. at such a place in London. The defendant, after oyer of the bond and condition, pleaded payment at the day &c. and on issue joined it was tried in Middlesex, before the Lord Ch. J. Holt, and verdict for the plaintiff. It was moved in arrest of judgment, that this ought to have been tried in London. But Powell, Powis, and Gould J. absente Holt, held, that according to the case of Croft and Boite in 1 Saund. 246. and Jew v. Briggs, 3 Lev. 394. and Dame Calverly v. Leving, it was aided after verdict. 2 Ld. Raym. Rep. 1212. Mich. 4. Ann. Maitland v. Taylor.

3. Nor any judgment after verdict, confession by cognovit actionem, or relicta verificatione, shall be reversed for want of misericordia or capiatur; or that a capiatur is entered for a misericordia, or a misericordia for a capiatur; nor for that Ideo concessum est per curiam is entered for Ideo consideratum est per curiam; nor for that the increase of costs after a verdict in an action, or upon a nonsuit in replevin, are not entered to be at the request of the party; nor by reason that the costs in any judgment are not entered to be by consent of the plaintiff;

The plaintiff laid 4 counts, and defendant demurred to one, and plaintiff joined in demurrer, and had judgment, and then

entered a nolle prosequi as to the other 3, but without a misericordia, whereupon defendant brought error, and assigned this matter, and cited Co. Ent. 676. to which it was answered, that by 16 Car. 2. cap. 8. no judgment after verdict &c. shall be reversed for want of a misericordia, and that by 4 & 5 Ann. cap. 16. no judgment shall be reversed &c. by reason of any matter which would have been aided by any statute of jeofails in case of a verdict so as an original writ &c. be filed, and therefore the judgment is not to be reversed for want of that word. But per Cur. if the entry had been necessary at common law, there is no statute of jeofails which cures the want of

of such entry; for those statutes extend to judgments entered by confession, nil dicit, or non sum informatus, but the principal judgment is neither of these, for it is a judgment upon a demurrer joined. Now at common law there was no need of entering a misericordia in such cases, because such entry is only pro salto clamore, and here is no colour of any false complaint, because the plaintiff says, non vult ulterius prosecui; and as for that case in the Ld. Coke's entries, many of them have been condemned; so the judgment was affirmed. 8 Mod. 198. Mich. 10 Geo. 1724. Anon.

In trespass  
for fishing in  
his several  
fishery &  
piscus cepit.  
After ver-  
dict it was

4. But all such omissions, variance, defects, and all other matters of like nature, not being against the right of the matter of the suit, nor whereby the issue or trial are altered, shall be amended by the courts where such judgments are given, or whercunto the record is removed by writ of error.

moved that he should have alleged what kind of fish, and the number. But it was answered that this was helped by the Oxford act, and that the words, that judgment shall not be arrested for any other exception that does not alter the nature of the action or trial of the issue shall extend to this case. But per Cur. None of the acts have aided this case, the number of the fish not being expressed; as if one should bring trespass for taking his beasts, and not say what. Vent. 272. Trin. 27 Car. 2. B. R. Anon.——Vent. 329. Trin. 30 Car. 2. B. R. Hovel (alias Howell) v. Reynolds S. P. and 2 Jo. 109. S. C. and judgment quod querens nil capiat &c.——See Tit. Trespas (I. 2) pl. 5. S. C.

In ejectment, the verdict was *Jacens proximum ad messuagium modo F. N.* and the judgment was *jacens proximum ad messuagium in occupatione F. N.* This being assigned for error, Raymond J. held that if this variance be not amendable by the common law, it is not within any of the statutes of jeofails unless the words of 16 & 17 Car. 2. will help it, viz. “But that all such omissions, variances, defects and all other matters of like nature, not being against the right of the matter of the suit shall be amended &c.” But he thought that (of) and (in the occupation of) are the same. Et adjournatur. Raym. 598. Trin. 32 Car. 2. B. R. Norris v. Bayfield.

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5. S. 2. This act shall not extend to any appeal of felony or murder nor to any indictment or presentment of felony, murder, treason, or other matter, nor to any process upon them, nor to any action upon any penal statute, other than concerning subsidies of tonnage and poundage.

For further explanation of this statute see the proper divisions under this Head.

## ( Q ) Statute of 4 & 5 Ann.

In debt on  
a bond the  
defendant  
cognovit  
actionem,  
but in bar  
of execu-  
tion as to  
his person  
&c. pleaded  
that he was  
a prisoner  
&c. & de-  
bito modo  
discharged  
juxta for-  
mam statuti  
for relief  
of insolvent  
debtors.

4 & 5 Ann. cap. 16. **W H E R E** demurrer shall be joined and entered in any suit in any court of record, the judges shall give judgment, according as the very right of the cause and matter in law shall appear without regarding any imperfection, omission or defect, in any writ, return, plaint, declaration, or other pleading, process or course of proceeding, except those only which the party demurring shall specially set down with his demurrer as causes of the same, notwithstanding that such imperfection &c. might have heretofore been taken to be matter of substance, and not aided by the statute 27 Eliz. cap. 5. so as sufficient matter appear in the pleadings, upon which the court may give judgment according to the right of the cause; and no advantage shall be taken of an immaterial traverse, or of the default of entering pledges, or of the default of alleging the bringing into court any bond or other deed mentioned in the plead-

ing;

*ing; or of the default of alleging of the bringing into court letters testamentary, or letters of administration; or of the omission of vi & armis & contra pacem;* The plaintiff demurred, and insisted that

it did not appear that he petitioned, and that defendant ought to shew his qualifications, and that he is within the act, and that it ought not to be put upon the plaintiff to do it. The defendant, without pretending to make his plea good, insisted upon this act, viz. that judgment should be given as the right appears. It was insisted for the plaintiff that here appeared no sufficient cause of discharge, but a good cause of action for the plaintiff; and per Powell J. this act does not help substance; and that if this sort of pleading be made good, the court can never know when particular jurisdictions act with authority and when not; Quod Holt Ch. J. concessit, and said that this exposition was to take away the party's issue from him. See 2 Salk. 521. pl. 24. Turner v. Beale Pasch. 5 Ann. B. R. and Ibid. pl. 25. Hill. 5 Ann. B. R. Woodrington v. Deverill.

By this statute no advantage can be taken upon a general demurrer of such faults in form as would be cured by verdict. See 10 Mod. 252.

*Administrator brought debt in the debet & detinet against the heir of the obligor, and concluded ad damnum ipsius the plaintiff &c.* After verdict on nil debet this was moved in arrest of judgment. It was confessed to be a fault in form, but that it was cured by the verdict by stat. 16 & 17, Car. 2. and by this statute; and per Cur. this statute does not relate to obstruct this judgment; for the court are to proceed to it notwithstanding any default in form, unless advantage is taken of such fault upon a special demurrer, which not being done in this case the plaintiff had judgment. 8 Mod. 356, 357. Pasch. 11 Geo. Newland v. Filer.

*Or of the want of averment of Hoc paratus est verificare; or Hoc paratus est verificare per recordum, but the court shall give judgment according to the very right of the cause without regarding any such imperfections, or any other matter of like nature except the same shall be specially shewn for cause of demurrer.* Error assigned was that in the declaration it was Collins per . . . Busby attor-

*sum sum* without any christian name. Holt Ch. J. said, that he remembered a case, where it was assigned for error, that the attorney by whom the party appeared was *no attorney of that court*; but it was disallowed for error, and that is not the merits of the cause, and may be helped by the late act, it being after verdict. Judgment affirmed. 11 Mod. 219. pl. 8. Pasch. 8 Ann. B. R. Nelson v. Collins.

In action of debt upon a recognizance of bail, the defendant pleaded payment; the plaintiff replied non payment, and concluded with an averment instead of to the country, whereto defendant demurred generally and the question upon the argument was, whether this was helped by the statute for the amendment of the law 4 & 5 Ann. The court gave judgment for the plaintiff nisi, but the plaintiff afterwards, upon advising with his counsel, moved to amend upon payment of costs. Barnes's notes of C. B. 7. Pasch. 7 Geo. 2. Sharp v. Starye.

*S. 2. All the statutes of jeofails shall be extended to judgment entered upon confession, Nihil dicit, or Non sum informatus, in any court of record; and no such judgment shall be reversed, nor any judgment upon any writ of inquiry of damages executed thereon be stayed or reversed, for any thing which would have been aided by the statutes of jeofails in case a verdict had been given in the action, so as there be an original writ or bill, and warrants of attorney, duly filed.* But where after judgment on demurrer the want of a bill was assigned for error, and the chief justice certified that

no bill was filed in that term, it was insisted that it shall not be filed in another term, and this statute enacting that all statutes of jeofails shall extend to judgment by confession, nil dicit &c. and that no such judgment shall be reversed so as an original writ or bill is filed, it imports that if no bill is filed the judgment shall be reversed. And the court seemed of opinion that after such certificate by the Ch. J. a motion for filing a bill was improper. 8 Mod. 283. Trin. 10 Geo. 1. Martin v. Budgell.

9 Ann. cap. 20. Enacts, that the statute of 4 & 5 of Ann. cap. 16. of amendment of the law, and all statutes of jeofails shall be extended to writs of mandamus and informations in nature of quo

warranto, and proceedings thereon for any the matters in the said act mentioned.

For further explanation of these statutes, see the proper divisions under this head.

(R) Statute of 5 Geo. 1. cap. 13.

*E. recovered judgment in scire facias against P. & R. and S. in the Marshalsea as bail for one C. and afterwards P. and Q. only brought a writ of error, which was ill, and*

*By 5 Geo. 1. cap. 13.*

*It is enacted that all writs of error wherein there shall be any variance from the original record, or other defect, may and shall be amended and made agreeable to such record, by the respective courts where such writ or writs of error shall be made returnable; and that where any verdict hath been or shall be given in any action, suit, bill, plaint, or demand, in any of his majesty's courts of record, the judgment thereupon shall not be stayed or reversed for any defect or fault, either in form or substance, in any bill, writ original or judicial, or for any variance in such writs from the declaration or other proceedings.*

the record not removed thereby; it was moved to amend the writ by this statute; but the court held it not amendable the other defendants not joining in the writ; and the writ of error was quashed. 2 Ld. Raym. Rep. 1532. Trin. 2 Geo. 2. Elkins v. Paine.

The plaintiffs in error set forth that D. the defendant in error had brought an *ejectment* for lands against the plaintiffs and one F. E. and set forth the whole proceedings against them and F. E. and then *threw the death* of the said F. E. and then conclude that the said judgment was *ad grave damnum* of the plaintiffs and *cujusdam M. E. filie & heredis prædicti F. E.* and the plaintiffs and M. E. join in the assignment of errors. The court held this case plainly within this act which amends all variances and defects which vary the writ from the record. Now the suggestion of the death of F. E. is right and necessary, for otherwise the writ would be wrong; then the *ad grave damnum*

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of M. E. &c. is the only variance from the record, as not being warranted by it, and therefore amendable; the plaintiffs had also liberty to withdraw the assignment of errors in which M. E. had joined, as it was still in paper, and that the defendant had not pleaded. Gibb. 201. 202. pl. 13. Hill. 4 Geo. 2. B. R. the

Hollow Sword-blade Company v. Dempsey.

Per cur. where an amendment of a writ of error is prayed upon the statute of 5 Geo. 1. cap. 13. it is to be *without costs*; but if the prayee be also to amend the assignment of errors, the rule is *with costs*, because then the party comes for a favour of the court. Gibb. 268. pl. 14. Pasch. 4 Geo. 2. B. R. Marret v. Gardiner.

S. 2. *Provided, that nothing in this act shall extend to any appeal of felony or murder, or to any process, or any indictment, presentment, or information, of or for any offence or misdemeanor whatsoever.*

(S) Statute of 4 Geo. 2. cap. 26.

4 Geo. 2. cap. 26. S. 1. **E**NACTS that, all writs, process, pleadings, rules, indictments, records, and all proceedings in any courts of justice within England, and in the court of exchequer in Scotland, shall be in the English tongue. But by stat. 6 Geo. 2. cap. 6. S. 1. this act shall not extend to the court of the receipt of his Majesty's Exchequer.

S. 2. *Mistranslation or mistake in clerkship in proceedings begun before the 25th of March 1733, being part Latin and part English shall be no error, but may at any time be amended, whether in paper or on record, before or after judgment, upon payment of reasonable costs.*

S. 4. *Every statute for amending jeofails shall extend to all forms and proceedings (except in criminal cases) when the proceedings are in English, and this clause shall be taken in the most beneficial manner.*

(T) Variance of Names and Things in the Writ, Count, or Specialty.

1. **I**N trespass it passed for the plaintiff, the defendant alleged in arrest of judgment that the writ is *arbores succidit, cepit & asportavit*, and in the count (*succidit*) is left out. But per Strange the writ is good, and the count may be amended by the statute; by which he awarded that the plaintiff shall recover. Br. Amendment, pl. 30. cites 7 H. 6. 26.

for raising the yard, and the declaration was for exalting the yard and making a gutter there, and so more comprised than was in the writ. After verdict this was held by the court to be ill, and not aided by the statute. Cro. E. 829. pl. 34. Pasch. 43 Eliz. C. B. Norton v. Palmer.

In an action on the statute for the tithes of 20 acres de quibus quidem triginta acris no tithes had been paid &c. after verdict for the plaintiff, it was moved to amend and make it (viginti) according to the first part of the declaration; but all the rolls being viginti, it was held that it could not be amended; but being after verdict the court inclined that it was well enough, and the (triginta) only surplusage; for de quibus quidem acris is good enough; and cannot be intended of more than 20 acres. Sid. 135. pl. 9. Pasch. 15 Car. 2. B. R. Fanshaw v. Mildmay.— Lev 97. S. C. and per cur. there being no 30 before, the 30 is void, and judgment for the plaintiff.

2. Bill of debt of 100 marks by attorney in C. B. &c. and demands 100 marks, in as much as he acknowledged himself indebted to the plaintiff\* in 100*l.* and it was abated without amendment. Br. Amendment, pl. 33. cites 7 H. 6. 36.

the obligation, it is the default of the clerk who sees the record and the specialty, and if this matter be found by examination of the clerk, it shall be amended, per Fairfax; but per Pigot, a thing which ought to come by information of the party, as the will, mystery, or the like, shall not be amended. Br. Amendment, pl. 48. cites 9 E. 4. 15.

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Br. repleader, pl. 3. cites S. C. — In trespass, the original was *Teste 3 Jan. 6. Jac.* and in the declaration supposed the trespass to be done 20 Jan. 6 Jac. which is after the teste of the original; agreed that this shall not be aided by the statute of jeofails. 2 Brownl. 273. Mich. 7 Jac. Anon.

3. In *trespass* the plaintiff counted *Quod transgressionem prædictam continuando till the day of the writ*, that is to say, the 18th day of March, where the teste was the 10th day of January. The defendant pleaded other issue which passed against him, by which he prayed amendment; and per Newton, this is reasonable, for it is only a misprision of the clerk, but Fortescue contra, for then the jury have given too little damages, and then attain lies; quære; for the plaintiff recovered, but writ of error was brought immediately. Br. Amendment, pl. 3. cites 20 H. 6. 15.

So in debt upon an obligation where the writ varies from the obligation.

4. *Audita querela* against W. Langwat upon indenture of defeasance, and because the indenture was Langawat, and the writ was Langwat, leaving out (a) therefore ill, but because it was misprision of the clerk, therefore it was amended. Br. Amendment, pl. 38. cites 21 H. 6. 7.

Br. Amendment, pl. 38. cites 21 H. 6. 7. — debt upon an obligation, the plaintiff was named R. Hill in the writ, and R. Hull in the obligation, and it was amended, though it be original; contrary, it was said, *peradventure*, if it was the defendant who was misnamed; quære diversity; but the statute is that for a syllable or letter too much or too little no writ shall abate, and if the letter (i) be added to R. Hill it will be R. Hull, therefore it was amended. *Quod nota bene*. Br. Amendments, pl. 40. cites 22 H. 6. 43.

5. Where the writ was *Jo. Littleton*, and the patent *W. Littleton*; and where the patent was Will' Hals and Ric' Niveton, and the writ Will' Has and Ric' Newton, those shall not be amended; for the proper names of justices or of parties cannot be amended. Thel. Dig. 224. lib. 16. cap. 6. S. 16. Trin. 27 H. 6. Amendment 34.

6. Writ of *forger* of false deeds was *diversa falsa facta & minumenta*, and the count was but one deed of feoffment, and one letter of attorney, and therefore the count ill, and could not be amended, unless *ex assensu partium*, because the count was of another term. Br. Amendment, pl. 15. cites 35 H. 6. 37.

7. In *forcible entry* the certainty of the land was omitted in the count, and was abated, and not amended. Br. Amendment, pl. 106. cites 38 H. 6. 1.

Debt upon an obligation against the abbot of C. alias dict. J. S. Clerk,

and in the count J. S. clerk was omitted; and therefore the defendant pleaded the variance to the count, and because the declaration was entered this same term, therefore it was amended *per judicium*; quod nota. Br. Amendment, pl. 69 cites 14 E. 4. 25.

Where the declaration varied from the original in the defendant's name and addition, it was said, that the curfitor or clerk that made out the writ may be ordered to attend, and if his instructions were right, to amend the writ by them. 2 Vent. 46. Pasch. 1 W. & M. in C. B. Anon.

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S. C. cited accordingly, per cur. 2. Rep. 17. 2. Mich. 28 & 29 Eliz. in Lanc's

9. In a *formedon* brought upon a patent of H. 7. the four capital letters of the four first words were omitted, viz. H. R. A. F. for *Henricus Rex Angliæ, Franciæ &c.* on purpose that there might be the more room \* to flourish and beautify them with gold. The Ld. keeper said he would cause the same to be amended if the

justices



justices of C. B. would certify that he might; but afterwards the patent was allowed in C. B. to be good, as it was by reason of the number of patents that are so. D. 342. a. pl. 53. Trin. 17 Eliz. Digby v. Mountford.

case.—  
S. C. cited  
9 Rep. 49.  
a. by the  
reporter in  
a note.—

S. C. cited Arg. Goub. 415.

10. Resolved per tot. cur. that where the original writ varies from the declaration it is not remedied by any statute of jeofails. 5 Rep. 37. Pasch. 34 Jac. [but seems misprinted for Eliz.] Bishop's case.

Roll. Rep.  
422. pl. 26.  
S. C. &  
S. P.—  
S. P. Arg.  
and seems

admitted per cur. Cro. J. 674. 675. Mich. 21 Jac. C. B. in pl. 8.

11. In debt for 800 l. the Plaintiff declared upon a statute obligatory *solvendum on request*, and it appeared to be payable at a certain day; this was held by the whole court to be a fault incurable. Cro. J. 316. pl. 20. Mich. 10 Jac. Fox v. Inkes.

Bulst. 217.  
Fox v. Jug  
S. C. but  
S. P. does  
not appear.

12. The plaintiff was a bishop, and declared upon a lease made by himself, and the original was, of a lease made by his predecessor; adjudged that this is a material error, and though it was after a verdict, it was not helped by the statute of 18 Eliz. and therefore the judgment was reversed. 3 Bulst. 224. Mich. 14 Jac. Young v. Bishop of Rochester.

S. C. cited  
as the  
Bishop of  
Worce-  
ster's case.  
Cro. C. 272.  
in pl. 8.—  
Roll. Rep.  
432 pl.

16. the Bishop of Rochester v. Long, S. C. and though it was objected that the point of the writ was the waste for which the action was brought, and that the time of making the lease was not material, and that it was not like Bishop's case, as had been urged, for there the variance was material, because Christopher and John could not be one and the same person; but the court held this all one with Bishop's case; for the lease by the predecessor cannot be intended the lease made by the successor; and they reversed the judgment.

13. In warrantia chartæ, the plaintiff counted upon a feoffment made by *dedi & concessi ad D.* in Norfolk, whereas the land was laid to be in another town, and upon demurrer this gross fault appeared, and it was denied to be amended, because it was pleaded without a serjeant's hand. Hob. 249. pl. 322. Hill. 16 Jac. Barret's case.

14. Error of a judgment in assault in battery, the writ was directed to the sheriff of Middlesex, and in C. B. the plaintiff declared upon an action in London, and so there was variance between the writ and declaration. The court held it to be erroneous. It is true, where there is no original it is helped by the statute, but a vitious original is not helped, wherefore the judgment was reversed; for the court is certified that this is the writ in this plea, betwixt the same parties, and the court will not intend another writ, or that it was without writ. Cro. J. 479. pl. 3. Pasch. 16 Jac. B. R. Pollard v. Blight.

Assault and  
battery was  
laid apud  
Islington in  
com. Mid-  
dlesex, but  
in the bill  
on the file  
it was laid  
in London,  
but it being  
after a ver-  
dict, the  
court held

that it was aided by the statute as the want of an original writ is, and that this bill in London is as no bill at all for this action brought and tried in Middlesex. Cro. J. 654. pl. 4. Hill. 27. Jac. B. R. Calthorp v. Culpepper.—Palm. cites 428. S. C.

15. In trespass; the original writ was of trespass in Ruddlelow, and the declaration was of trespass in Boxe; it was certified that this was the writ on which the declaration was founded, and upon  
Sci.

Sci. Fa. two nihil returned, though it was known to one of the judges that Ruddlow was an hamlet of Boxe, yet the court not knowing it, it was held a variance in substance not helped by any statute, and judgment was reversed. Cro. J. 664. pl. 17. Hill. 20 Jac. B. R. Hendy v. Thirst.

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Palm. 428.

Reyn II v.

Trelawny,

alias, Kelly,

S. C. the

court di-

vided.—

Latt. 116.

Trelawney

v. Reynel,

S. C. no

judg-

ment.—

Ibid. 225.

S. C. and the court divided.

16. In debt on account, the writ was recited in the declaration, and the account was *set forth to be apud Exon*, whereas the original writ was certified *Devon*. It was moved in arrest of judgment, for that though the statute helps after verdict where there is no original, yet when there is an original which varies from the declaration, and does not warrant it, it is not aided by the statute; but per cur. this is not any original for this action in the county of Exon, and so it shall be taken as if there was no original, and so be within the purview of the statute. Cro. J. 674. pl. 8. Mich. 21 Jac. C. B. Reynel v. Kelsey.

17. In error brought to reverse a judgment in an inferior court, for that the *plaint* was entered *against Francis*, and the *proceedings* were *against John*. By Roll. J. The *plaint* being in the nature of an original writ, it cannot be helped, though it be after a verdict. Sty. 115. Trin. 24 Car. Brereton v. Monington.

See Stat. 16

&amp; 17 Car.

2. cap. 8.

at (P)

18. Judgment in *ejectione firmæ* was reversed, because the words *vi & armis* in the writ were omitted in the declaration. Cro. C. 407. Pasch. 11 Car. B. R. in case of Mayo v. Coghill.

2 Keb. 483.

pl. 21. Car-

der v. the

Inhabitants

of Leseles,

S. C. adjor-

natur.—

Ibid. 487.

pl. 31. S. C.

adjournatur.

—Ibid. 498

pl. 58.

The King v. the Hundred of Little and Lefnes, S. C. The court ordered an amendment.

19. *Debt upon the statute* of hue and cry against the hundred was by original, and at the nisi prius the plaintiff was nonsuit, because the original was (*Edward*), when it should be (*Edmund*). A rule was made for the cursitor to attend, and that if he had right instructions then to amend it, which he did in open court. Sid. 412. pl. 8. Pasch. 21 Car. 2. B. R. Parker v. Hundred of Little and Lefney.

Ejection of

6 messuages,

100 acres of

land, 300

acres of pas-

ture &amp;c.

After ver-

dict it was

moved that

this suit is

by original

writ, and

the writ does not warrant the declaration; for the original is of one messuage and 60 acres of land.

Per cur. absente Richardson, This shall not be intended the original upon which the plaintiff declared, but that there was another original which is imbezelled; 1st, because the writ bears teste 18 Aprilis, returnable 15 Pasch. and this declaration is in Trinity term, and here is no continuance upon this writ. 2dly, The writ is against the defendant and a copyholder, and in this declaration there is no name of the copyholder; and so this want of an original is aided by the statute of jeofails, and judgment for the plaintiff. Cro. C. 327. pl. 10. Mich. 9 Car. B. R. Johnson v. Davy.

20. The original in trespass was *Quare clausum fregit*, and the declaration was *Quare clausum & domum fregit*; and after a judgment for the plaintiff in C. B. and a writ of error brought, this variance was assigned for error; but it was argued that this original being certified 3 terms since, and no continuances, it could not be the original to this action, and so a verdict may be intended without any original, which is aided by the statute of jeofails, and the judgment was affirmed. 3 Mod. 136. Trin. 3 Jac. 2. B. R. Taylor v. Brindley.

(U) Variance between Count and Count, where there are several, amended.

1. **D**EBT upon an *obligation of 12 Nov.* after imparlance, and in the next term the plaintiff *declared anew* upon an obligation of *12 Feb.* and upon *nihil dicit* had judgment. Upon error brought the court were divided whether this should be amended. Golds. 136. pl. 36. Hill. 43 Eliz. Wilkinson's Case.

2. In *debt upon obligation dated 13 Feb.* after imparlance a *2d declaration* was made, which was of *obligation dated 15 Feb.* After *Non est factum* pleaded and *issue entered*, the variance was discovered, and prayed to be amended and made agreeable to the first declaration, and so it was ordered per Cur. For the first is the principal; and all the prothonotaries said that this is no inconvenience to the defendant; for his *plea always refers to the first declaration*, and is entered as to the first. Cro. J. 105. pl. 41. Mich. 3. Jac. B. R. Burrel v. Bowes.

had pleaded to it, and by such amendment his plea would be altered, and so the trial would go against him; but afterwards it was granted to be amended per tot. cur. For the imparlance was entered Hill. 1 Jac. and the issue was Pasch. 2 Jac. but the defendant was admitted to plead *de novo* at his pleasure.—See 3 Bulst. 227. Mich. 14 Jac. Milward v. Maby, like point; and the better opinion of the court seemed to be, that the judgment was well given, and not erroneous. —And see *ibid.* 223, 229. Milward v. Watts. and Cro. J. 415. pl. 4. S. C.

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Brownl. 57.  
Burrel v.  
Bowes,  
S. C. says  
that at first  
it was  
denied to be  
amended,  
because the  
defendant

3. In *ejectment* the plaintiff declared upon a *demise of 25 March 6 Jac.* by virtue whereof he entered, and was possessed until the defendant posted, viz. *anno sexto supradicto*, ejected him. After imparlance the plaintiff made a *second declaration*, and therein the ejectment was set forth to be *Maii anno supradicto*, which was right, and so found against the defendant; but whether this was erroneous, because no day of ejectment was mentioned in the first declaration, was the question. It was agreed per cur. that if any matter of *substance* be omitted in the first declaration, which is the principal and material declaration, it *cannot be aided* or amended by the second; for that is but a mere recital of the first. Cro. J. 311. Mich. 10 Jac. Merrell v. Smith.

4. The plaintiff declared that the defendant *die Augusti assaulted &c.* omitting the day of the month; but the declaration upon the imparlance roll was perfect. After a verdict and judgment, it was assigned for error, and took a difference where the *first declaration is perfect, and the 2d defective*, that this is not error; for the court is to adjudge upon the first declaration only, the 2d being only a recital of the first, and begins with an *alias prout patet &c.* The court held the first declaration imperfect and void, and that the omission of the time is matter of substance, and reversed the judgment. 2 Roll. Rep. 152. 153. Hill. 17 Jac. B. R. Bicroft's case.

5. In a declaration delivered by the by, the plaintiff's christian name was mistaken *John*, where it should be *Peter*. Powis

and Gould J. (being only in court) held it not amendable, because there is *no writ which it can be amended by*. 2 Ld. Raym. Rep. 771. Trin. 1 Ann. B.R. Poitvin v. Tregeagle.

6. In assault and battery, the first count was of a battery, by the defendant on John B. and the second and 3d counts were of a battery by the defendant on the said Sam. (which was the defendant's name instead of the plaintiff's.) After verdict for the plaintiff, this being moved in arrest of judgment, the court held that it was aided by the 16 & 17 Car. 2. which helps all mistakes of the christian and surname of the parties who are once rightly named before in the same record, and here *John* is named right in the first count. Comyns's Rep. 557. Hill. 10 Geo. 2. C. B. Blacklock v. Mariner.

## (W) Variance of Names and Things in the Writ, and Re-attachment, &amp;c. amended.

1. **I**N annuity the defendant prayed in aid, and the prayee was effoigned, and at the day of adjournment the defendant's attorney was effoigned, and the name of the plaintiff varied from the effoign, and because it was a common effoign it was amended. Br. Amendment, pl. 26. cites 2 H. 4. 4. 8 Rep. 156. b. cites S. C.

2. In entry upon the statute of R. the original was to the sheriff of S. against J. B. of C. in the county of B. gentleman, and was sine die by demise of the king, and re-attachment to the sheriff of S. against J. B. of C. in com. tuo, gentleman; and per Danby, Choke, Davers, and Moyle J. it shall not be amended; for then J. B. of C. in the county of B. is not attached. But per Ashton, Laicon, and Danby mutata opinione, it shall be amended. Br. Amendment, pl. 67. cites 2 E. 4. 7. But if the original was J. B. and the re-attachment W. B. this shall not be amended; for it is not the same person, and

then the defendant is not re-attached; per Danby, Choke, Davers, and Moyle J. Br. Amendment, pl. 67. cites 2 E. 4. 7. — But if one be named J. Hitchet in the original, and J. Hitchcocke in the re-attachment, this shall be amended; for it may be intended one and the same person, and known by both names. Ibid.

3. Writ of adjournment of a term made mention only of common days of the term, as actions and process returnable oct. Trin. 15 Trin. &c. had day 15 Mich. A plea had special day upon bill in B. R. the Monday after oct. Trin. and was at issue, and passed for the plaintiff, and was discontinued for want of mentioning special day in the writ of adjournment, and could not be amended; quod nota; by which the writ of adjournment and the roll of it were amended by a special act of parliament. Br. Amendment, pl. 70. cites 4 E. 4. 41. Br. Discontinuanec, de Process, 36. cites S. C. — Br. Parliament, pl. 54. cites S. C.

## (X) Variance of Names and Things in the Writ, Imparlance-Roll, or Plea-Roll, or Nisi Prius Roll, amended.

1. **D**EBT for buying 64 combs of grain, and this contra formam statuti. The defendant said that he did not buy the said 60 [combs] modo & forma, and so to issue, and did not answer to the 4, and it was moved to have it amended; but per cur. it cannot be; for then this is not the plea of the defendant for part, and this is matter and substance, and the act of the party, and not misprision of the clerk. Quod nota. Br. Amendment, pl. 1. cites 27 H. 8. 1.

2. A declaration was of a trespass done the 12th of Jan. 45 Eliz. and the record of nisi prius was of a trespass the 12th of Jan. 25 Eliz. The verdict found the defendant guilty. At the day in

bank the plaintiff prayed amendment of the nisi prius; but the court held it not amendable. Mo. 681. pl. 935. Anon.

Yelv. 164.  
S. C. and  
Brownh  
seems to be

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only a  
translation  
thereof.

3. In *ejectment* brought of two houses, the bill filed was only for one; but the defendant by the Paper-book pleaded to both the messuages Not Guilty, and the roll and record of nisi prius were two houses. After verdict and judgment entered for the plaintiff, a writ of error was brought, and before the record was removed, the plaintiff moved that the bill upon the file might be amended and made two messuages. It was resolved by the whole court, that because the defendant's plea was of two messuages, and the roll and record accordingly, the bill should be amended; for the bill which mentions only one house could not be the ground of all the proceedings afterwards, but it was as if no bill had been filed and therefore it should be supplied, and so it often had been done before the record was renewed [removed.] Quod nota. Brownl. 144. Mich. 7 Jac. [B. R.] Saunders v. Cottington.

Het. 164.  
S. C. and  
seems to be  
only a  
translation  
of Litt.  
Rep.

4. Action was brought against *W. Malin of Langley*; and the record of nisi prius was *W. Langley of Malin*. But per cur. it shall be amended, for it is a plain mistake of the clerk, for *the whole record besides is right*, and the record of nisi prius ought to be amended by the record in bank according to 44 E. 3. But if the issue had been mistaken it had been otherwise. Litt. Rep. 349. Mich. 6 Car. C. B. Malin's case.

Hutt. 81.  
Wade's case  
S. C. ac-  
cordingly,  
and a dif-  
ference was  
taken that  
when the  
nisi prius is  
so mistaken  
that the a-  
mending it  
would pre-  
judice the  
jury by falsifying their verdict, it shall not be amended, but in this case it is but the writ by which the jury is warned to appear.

5. In *assumpsit*, the writ and declaration were against Ann, executrix of Sir William Wade, and the issue, record, and venire facias were accordingly; but the writ of hab. corpora jurat' were between the plaintiff and the Lady Wade, executrix of Sir Henry Wade Knt. and therefore it was moved in arrest of judgment that it was a trial without warrant. But per tot. cur. because the issue, the record of nisi prius, and the venire facias were good, the misprision in the hab. corp. was but the fault of the clerk, and well amendable. Cro. C. 32. pl. 3. Pasch. 2 Car. 1. Ann Smith v. Ann Lady Wade.

Trespass  
and eject-  
ment against  
7 defen-  
dants, who  
all appeared  
and pleaded,  
and joined  
issue on the  
pl a roll;

6. The writ of nisi prius is amendable by the statute 8 H. 6. and to be made according to the record, but with this caution, viz. that the record of nisi prius has sufficient matter in it either express or implied to give authority to the justices of nisi prius to try the issue; for they cannot try any issue by force of the statutes thereof made without authority given to them by writ of nisi prius. 8 Rep. 161. in Blackamore's case.

the jurat' & distringas was against all 7, only the issue on the nisi prius roll was joined by five only, verdict at the assises against 7. And after several motions in arrest of judgment it was resolved by the whole court, That the nisi prius roll was in this case amendable; here the judge has an implied authority; for here is an issue joined on the record by all 7. If one issue had been joined by the 5, and another by the other 2, it had been otherwise. The jurata and distringas are against all 7, to try this issue of Not Guilty; so that the judge has plainly an implied authority to try the issue between the plaintiff and the 7; and that omission is plainly a misprision of the clerk, and therefore such a mistake in all actions and cases is amendable, and especially in this action of ejectment, where all 7 are bound by rule of court to confess lease, entry, and ouster. 12 Mod. 107. Mich. 8 W. 3. White v. the Bishop of Worcester. — S. C. & P. and nothing is to come in question but the title:



and Rookby J. said the rule implies a consent that it should be amended. Comb. 393. Mich. 8 W. 3. B. R. Tynet v. the Bishop of Worcester.—Ld. Raym. Rep. 94. Tite v. the Bishop of Worcester, S. C. and amended accordingly.

7. The defendant pleaded in abatement, and there being a judgment to answer over, issue was joined, and it was tried in the country, and the plaintiff had a verdict. It was moved to set aside this judgment, because the plea in abatement was not entered on the nisi prius roll, the plea roll was right, but the nisi prius shall not be amended by that; and for this reason the court set aside the judgment. 5 Mod. 399. Pasch. 10 W. 3. Durbartine v. Chancellor. Ld. Raym. Rep. 329. Doberteen v. Chancellor S. C. accordingly, and says that all the practisers in B. R. and all the protho-

notaries of C. B. certified that the constant practice is to have the plea in abatement entered in the nisi prius roll.—S. C. cited Carth. 499. in case of Harper v. Davys.—S. C. cited Ld. Raym. Rep. 510. in B. R.—S. C. cited 12 Mod. 274 Hill 12 W. 3. in S. C. of Harper v. Davis, which was thus, viz. *assumpsit*; the plea was entered in *Easter-term*, the memorandum was of a bill entered in *Hilary-term*. On issue joined it was tried by nisi prius, and the verdict was set aside, and a new trial granted, and tried this term in London; and in the new nisi prius roll the placita were of this term, and that the party appeared and pleaded this term, and verdict thereon; and now judgment was arrested, because the issue on the plea roll is of *Easter term*, and the new trial is but a continuance of the same cause, and so the record of nisi prius differs from the plea roll. 12 Mod. 274. Hill. 12 W. 3. Harper v. Davys.—Carth. 498. S. C.—Ld. Raym. Rep. 510. S. C. accordingly. [ 345 ]

8. In trover the plaintiff had described the parcels of goods in the nisi prius roll different from what he had in the copy of the issue. A rule was granted to shew cause why the nisi prius roll should not be amended by the copy of the issue, and afterwards (absente the Ch. J.) was made absolute. Barnard. Rep. in B. R. 441. Pasch. 4 Geo. 2. Blackford v. Hudson.

## (Y) Variance of Names and Things in the Writ, Records of Nisi Prius, Posteas, and other Records, amended.

1. **V**ariance was between the record and the writ of *certiorari*; for the one was *H. Grene* and the other was *H. de Greene*, and therefore they would not proceed. Br. Record, pl. 42. cites 28 Ass. 52.

2. The record of bank was *J. B. Gent.* and in the record of nisi prius (*gent.*) was omitted, and it was amended without repleading. Br. Amendment, pl. 105. cites 39 E. 3.

3. In all cases where the roll is entered contrary to the original, or the like, it shall be amended. Br. Amendment, pl. 34. cites 7 H. 6. 45. 8 Rep. 156. b. cites S. C. that in all such cases

it was amendable by the common law.—In debt, the defendant in the original was named *J. S. of Efton*, and the roll and all the process was *J. S. of Weston*, and the parties were at issue, and it passed for the plaintiff by nisi prius, and at the day in bank this matter was pleaded in arrest of judgment; & non allocatur, but it was amended according to the original by assent of the court. Br. Amendment, pl. 36. cites 19 H. 6. 15.

4. Debt against *J. N. of S. husbandman*, and the issue in the record was if he was husbandman *die brevis* or not, and the record of nisi prius Fitzh. Amendment, pl. 25. cites

S. C. —  
S. C. cited  
8 Rep. 161.  
b. and says  
it is to be  
observed as  
to the writ  
of nisi prius  
that the  
misprision  
of the clerk  
of the trea-  
sury who

writes it, is therein amendable by this statute (of 8 H. 6.) and to be made according to the record, but with this caution, viz. that the record of nisi prius *has sufficient matter in it, either express or implied, to give authority to the justices of nisi prius to try the issue*; for they cannot try any issue by force of the statutes thereof made without authority given to them by the writ of nisi prius, and that so it is adjudged in the said case of 11 H. 6. 11.

*prius* wanted these words, *die brevis*, and yet the justices took the verdict, if he was husbandman *die brevis*, and at the day in bank the plaintiff would have amended it by the statute according to the roll which was right, and was not suffered; for as here the inquiry of the justices of nisi prius was without warrant, because it was not in their record. Quære if it be aided now by the statute of Jeofails 32 H. 8. It seems that it is not; for it is not the default of the party, his attorney, nor counsellors, but the default of the officers. Br. Amendment, pl. 82. cites 11 H. 6. 11.

5. If the *one party is entered in the record for the other*, it may be amended. Br. Amendment, pl. 113. cites 1 H. 7. 23.

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6. Issue was *whether goods were delivered between two feasts*, and indorsed upon the panel (*Dicunt pro querente*) and yet the *postea* certified, and the rolls also made it that the delivery was *at the feasts*, and upon this matter alleged in B. R. and the error in this point assigned and certified out of C. B. the record removed by the writ of error was amended by award, and the word (at) razed out and the word (between) written instead thereof, according as it appeared by the note on the back of the panel, that it ought to have been. Poph. 102. says a precedent was shewn of this as Trin. 35 H. 8. Whitfield v. Wright.

7. Error was brought in the Exchequer-Chamber upon a judgment given in B. R. where the *indorsement* upon the back of the writ was (*pro quer*) and the *postea* and roll was *that the plaintiff was guilty*, and it was amended. Poph. 102. Hill. 38 Eliz. cites it as a late case.

8. Issue in C. B. was *whether J. S. were taken by a ca. sa. or not*, the jury found for the plaintiff, viz. that he was not taken by the said *capias*, and upon the *back of the panel* entered (*Dicunt pro quer'*) but on the back of the *postea* the clerk of the assises *certified* the panel thus, viz. that the jury say *that no capias was awarded*, which was otherwise than the issue was, and found by jury; and the *roll of the record* was according to the *postea*, and so judgment for the plaintiff. Error was brought and assigned this variance between the issue and verdict, but upon this matter certified out of C. B. the court of B. R. awarded the record sent out of C. B. to be amended according to the indorsement on the panel, which is the warrant for certifying the *postea*, and so this is a warrant over to him that makes the entry on the roll. Poph. 102. Hill. 38 Eliz. Wood v. Matthews.

In action  
for words,  
the plaintiff  
had a ver-  
dict, but  
part of the  
words found

9. In assumpsit the verdict was entered, *Quod assident damna occasione assumptionis predict'*, and this was awarded to be erroneous, but upon motion that the *note given by the jury to the clerk* was well, viz. that they found for the plaintiff, *et assident damna* without more, and that what was added was the misentry of the clerk; it

was

was ordered by Fenner and Clarke (only in court) to be amended. Note this was after *In nullo est erratum* pleaded; but this error was not assigned upon the record, but *Ore tenus*, &c. Cro. E. 678. Trin. 41 Eliz. B. R. Madox v. Dawson.

*by the jury specially, were not entered, which appearing upon exa-*

mination to be the default of the clerk of assise, the words were ordered to be inserted, the plaintiff paying costs to the defendant in a writ of error brought by him; because as the verdict was first entered, he had just cause to sue a writ of error. The record was amended, and judgment affirmed. 2 Jo. 212. Trin. 34 Car. 2. B. R. Nailer v. Clarke.

10. The defendant being an attorney of C. B. appeared in propria persona, and being at issue, the record of the nisi prius was, *Quod tam præd' (the plaintiff) quam præfat' defend' appeared per attornatos suos*; this being but a mis-entry of the clerk was amended. Cro. J. 265. pl. 29. Mich. 8 Jac. 1. Heyward v. Hayward.

11. In ejectment against A. B. C. and D. the jury found *A. and B. Not Guilty, and C. Guilty as to one messuage, &c. and D. as to 60 acres of land, &c.*; but in entering the judgment the clerk mistook the parcels, and entered, that *C. was guilty as to the 60 acres, &c. and D. as to the messuage, &c.* Upon a writ of error in B. R. this was adjudged amendable, because it is only a misprision of the clerk in matter of fact, when he had the record before him, by which he might be directed, but if it had been misprision in matter of law it could not be amended. Palm. 258. Mich. 19 Jac. B. R. Mason v. Molineux.

12. In the ven. fac. one of the jurors was returned by the name of *Edmund*, and it appears in the postea that he was sworn by the name of *Edward*. It was insisted that this cannot be intended to be the same person; but by Roll. Ch. J. it may be amended by the notes of the clerk of the assises by which he made the postea, and ordered him to be examined. Sty. 110. Trin. 24 Car. Norton's case.

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## (Z) Variance of Names and Things in the Writ and Exigent, amended.

1. *Exigent* in appeal was sued as against a principal, and the count was as against accessory, and it was amended. Br. Amendment, pl. 101. cites 7 H. 4. 27.

2. Debt against *J. N.* and the capias and all other process, and the exigent was *R. N.* and therefore the defendant was dismissed per judicium, because though the capias may be amended, yet exigent cannot be amended; for then *J. N.* shall stand outlawed where he never was proclaimed in the county, but *R. N.* Quod nota. Br. Amendment, pl. 4. cites 20 H. 6. 18.

*So, and for the same reason where in debt the original and other process was against*

*T. Senjohn*, without any (t) in the middle, and the exigent was *T. Seintjohn* with (t) and the outlawry was reversed without amendment; and it was said, that there is a great difference between the county of Hereford and the county of Hertford. Br. Amendment, pl. 89. cites 2 R. 3. 13.

3. Variance between the original and the exigent shall not be amended, though it be misprision of the clerk. The reason seems to be, because then the defendant is not this person who was proclaimed

*The case was thus; J. B. of C. in the county*

of C. gent.  
alias dictus  
J. B. of C.  
in the county

by the exigent; for where he was named with *alias dictus* in the original, in the exigent the *alias dictus* was put before the first name in the original. Br. Amendment, pl. 55. cites 38 H. 6. 3.

of O. gent. and the exigent was J. B. of O. in the county of O. gent. alias dictum J. B. of C. in the county of C. gent. and the outlawry was returned, and by the justices it is reverfable; for that which was before in the original was behind in the exigent, and there was no mention of amendment. It seems that it shall not be amended at the exigent. Br. Variance, pl. 60. cites S. C.

4. Error assigned was, that the original writ was 20 l. and so was all the mesne process, but when the defendant appeared at the exigent, the entry was, that *obtulit se in placito debiti* 10 l. when it ought to have been 20 l. Upon view of the record, it appeared that no original was certified, and therefore it could not be amended. Goldsb. 133. pl. 32. Hill. 43 Eliz. Stangiston's case.

Lat. 210.  
Plume's  
case, S. C.  
reported in  
the same  
words.

5. P. was indicted for a murder in Essex, and outlawed, &c. and the outlawry being certified into B. R. it appeared to be erroneous, because it was *Exactus est ad comitatum*, without saying (*meum*) whereupon the attorney general shewed the court, that the king had seised the lands, and therefore, to prevent reversal of the outlawry, prayed a certiorari to the coroners to certify, whether it was *Exactus ad comitatum*, &c. and if so, then upon his return to amend it, and it was awarded accordingly. Palm. 480. Trin. 3 Car. B. R. Plumm's case.

## [ 348 ] (A. a) Defaults and Mistakes in Writs Original and Judicial, amended.

As to defects by variance between writ and count, &c. see (T) and as to defects by omission see (O. a)

1. *SCIRE facias* upon a fine levied by King E. 2. *reddend' eidem regi & haered' suis* 10 s. *per ann' tenend' de nobis & haered' nostris*, where it should be *de E. 2. quondam rege & haered' suis*, and because it was a writ judicial, therefore it was not abated. Br. Amendment, pl. 104. cites 39 E. 3.

2. *Scire facias* upon office of mortmain was challenged for the king, because in the claim there was *false Latin*, &c. but it did not appear in what, &c. *et non allocatur*; but it was amended in the presence of the chancellor there; *quod nota*; and the writ was *claim* where it should be *clamat*. Br. Amendment, pl. 59. cites 40 Ass. 26.

3. *Scire facias* upon a fine was *Quare terra querentis descendere non debet*, where it should be *Executionem habere debet*, and yet well, but was not amended, because it was a writ judicial; for per Fincheden, writ original which wants form shall abate, and shall not be amended, because it is made in the Chancery, and pleadable here; but writ judicial which is made here, shall not abate for want of form if it has matter sufficient. Br. Amendment, pl. 20. cites 41 E. 3. 14.

Thel. Dig.  
223. lib. 16.  
cap. 6. f. 3.  
cites S. C.  
accordingly.

4. *Scire facias* upon a fine to execute the remainder, was *Quare praefato J. N. descendere non debet*, which implies execution; for it should be *remanere non debet*, and therefore was amended. Br. Amendment, pl. 23. cites 44 E. 3. 18.

5. In

5. In *scire facias* out of a record the name of the defendant was mistaken, and therefore he was not warned, by which it was not amended; for this is in substance; contrary if it had been in form, Br. Amendment, pl. 99. cites 3 H. 4. 8.

6. In *præcipe quod reddat* of rent, the *essoign* was *De placito annui redditus*, where it should be *De placito terræ* of rent of inheritance, and therefore was amended. Br. Amendment, pl. 29. cites 11 H. 4. 43.

Br. Essoign, pl. 37. cites S. C.

7. In *forger* of deeds the writ was *Imaginavit* for *Imaginatus fuit*, and was amended by award of the court. *Quod nota in* false Latin. Br. Amendment, pl. 81. cites 11 H. 6. 2.

S. P. in writ of conspiracy; for there is no

such Latin word as (*imaginavit*;) and it was said that this amendment was by force of the statute. Thel. Dig. lib. 16. cap. 6. pl. 11. cites 11 H. 6. 17.—But see stat. 4 Geo. 2. cap. 26. at (S)

8. *Formedon* of a gift made to Ro. and to his feme, and to the heirs of the body of Ro. &c. The writ was, that after the death of Ro. to the demandant descendere, &c. as son and heir, &c. without supposing the death of the feme, and it was abated, and could not be amended by the statute; for they cannot know if the feme be alive or not. Thel. Dig. 225. lib. 16. cap. 6. s. 29. cites Pasch. 11 H. 6. 34.

9. In *formedon* by two barons and their femes, the writ was, and that after the death of the donee to the barons and to their femes, *ut filiabus & hæredibus* of the donee descendere debet, &c. The writ was amended by judgment, and the descent made to the femes only; for Prisot took it as an apparent misprision of the clerk. But otherwise it should be if the writ had been to the barons and their femes *ut hæredibus* descendere, &c. without saying *filiabus*. Thel. Dig. 224. lib. 16. cap. 6. s. 21. cites Mich. 35 H. 6. 10. 13. and 2 H. 7. 11. agreeing, and 9 H. 7. 19.

If *formedon* in descender by baron and feme, is *quod descendere debet* to the baron

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and feme, this may be amended.

ed. Br. Amendment, pl. 60. cites 2 H. 7. 11. Per Hussey.

11. A man recovered in writ of annuity, and the record came into the resceipt, and *certiorari* issued to certify *tenorem recordi coram nobis in cancellaria*, &c. which was in *curia domini E. nuper regis Angliæ tertii coram R. Thorp, & sociis suis justiciariis nostris*, where the writ ought to be *Justiciariis ipsius nuper regis E. tertii*, and not (*nostris*;) and the best opinion was, that it shall be amended; for it is misprision of the clerk. But Danby contra, and that it shall not be amended; for the clerk had only the copy of the record to make the *certiorari*; for the record itself remains in the resceipt; for it is not like to an obligation, for there the clerk may have it before him; and therefore if he fails, and upon his examination confesses that he had the obligation before him, there the misprision shall be amended; but where he had not but a copy, then e contra; for then it is only the information of the party himself, which is at his peril. *Quod nota*. Br. Amendment, pl. 52. cites 37 H. 6. 27.

12. Land was given by fine to baron and feme, and to the heirs of their bodies, and *certiorari* issued to remove the record out of the Treasury into the Chancery; and now it came into C. B. by

*mittimus*,



mittimus, and the plaintiff brought *scire facias* upon it as heir to the baron and feme of their bodies, and in the mittimus he made himself heir to the baron only, and in the *scire facias* he had made himself heir to the baron and feme; and the opinion was, that the *scire facias* shall abate; for the *fine warrants the mittimus*, and the *mittimus warrants the scire facias*, and therefore they ought to agree. And by Vavisor, Rede, and Fineux, it shall be amended, because it is founded upon record. *Contra* of *scire facias*, which is founded upon surmise. Note the Diversity. Br. Amendment, pl. 63. cites 9 H. 7. 1. 8.

Br. Pleadings, pl. 169. cites S. C. & S. P.

13. A *scire facias* upon a judgment in assise, where one of the plaintiffs was knighted after the judgment. The writ was brought by A. B. Mil. and B. C. Mil. and the recovery was recited to be by A. B. Mil. and B. C. modo Mil. whereas the record of the judgment was by A. B. Mil. and B. C. without naming him Miles; and the court held that the writ was ill, because it ought to have been *Cum A. B. Miles, and B. C. modo Miles, per nomen A. B. militis, and B. C. recuperaverunt, &c.* but that it was but the mistake of the clerk in misreciting the record, and therefore it should be amended. 2 Ld. Raym. Rep. 1058. Arg. cites 11 Hen. 7. 25. a.

14. If writ judicial varies from the original, this shall be amended. Br. Amendment, pl. 48. cites 9 E. 4. 15.

15. Choke J. said that he saw writ upon the statute 5 R. 2. that the defendant entered *vi & armis* ubi ingressus non datur per legem, where *vi & armis* is not in the statute, and it was amended. But Catesby said that the original was made by the information of the party, and therefore shall not be amended. Br. Amendment, pl. 72. cites 10 E. 4. 11.

16. Where writ of *warrantia chartæ* is *Unde pactum habet*, where it should be *Unde chartam habet*, this shall not be amended; for form shall not be amended. Br. Amendment, pl. 78. cites 22 E. 4. 20.

17. So of *Præcipe quod solvit*, where it should be *Præcipe quod reddat*. Ibid.

18. So in *Quare impedit, quod permittat nominare*, where it should be *Presentare*, this shall not be amended. Ibid.

Br. Amendment, pl. 77. cites S. C.

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19. A *scire facias* was brought to have execution of a judgment recovered by A. and B. Sulyarde for the defendant prayed that the writ may abate, because the judgment was recovered by A. only; but the court amended the writ, because it was but *vitium clerici*. 2 Ld. Raym. 1058. Arg. cites 22 E. 4. 6. b.

Jenk. 218. pl. 64. S. C. that it is not amendable; for *erronice emanavit*.

20. A *mandamus* was awarded out of the Court of Wards to the *eschuator* of the county of S. who took a verdict; and before the ingrossing and sealing the verdict, which was agreed to be done at another day and place, a *superfedeas* came to him, at the conclusion of which was wrote *Superdeas* instead of *Superfedeas*. It was held by the court that the writ was not amendable. D. 170. pl. 2. Mich. 1 & 2 El. Ld. Powis's case.

21. In a writ of error to reverse a judgment, the error assigned was that the writ was in *the debet only*, where it ought to have been



been in the *debet & detinet*; and it was moved that this being only misprision of the clerk, it might be amended; but held per cur. that it was *matter of substance*, and therefore not amendable. 5 Rep. 36 Trin. 30 El. Walcot's case.

22. In *quare impedit* by the queen, exception was taken to the writ because the words were *Quod permittat ipsam præsentare ad rectoriam*, where it should be *ad ecclesiam*. The court awarded that the writ should be openly amended in court by a clerk of the Chancery. 4 Le. 12. pl. 47. Pasch. 37 Eliz. C. B. Anon.

23. Error, for that the writ, which was on the statute of Gloucester, was *Quod nullus faciat vastum, venditionem & destructionem, &c.* instead of *destructionem*; Resolved, that this being matter of substance, *destricatio* being a Latin word, alters the sense of the statute, and matter of substance in an original writ shall not be amended. 5 Rep. 45. Pasch. 41 Eliz. B. R. Freeman's case.

Cro. E. 462.  
pl. 9. Smith  
v. Freeman  
S. C. held  
per cur. not  
amendable,  
the word  
there being  
(*destricatio*-  
nem.)

—S. C. cited out of 5 Rep. by Doderidge J. 2 Bulst. 51. —S. C. cited Hutt. 56.

24. In *assise* the writ was *ad faciendum recognitionem illum*, instead of *illam*; and it was moved to be amended. The Curitor made oath, that the note which he now produced (which was right) was the original note, whereby the writ was made; but the court would advise. Hob. 128. pl. 162. Oglethorpe v. Mawde.

25. In *formedon* the writ was *consanguineus*, where it should be *consanguineo*. It was said by all the justices, that this may be amended by the statute. Het. 78. Hill. 3 Car. C. B. in case of Jenkins v. Dawson.

26. B. recovered in the *Marshalsea* against D. and thereupon brought debt in C. B. and D. pleaded *Nul tiel record*. A *certiorari* was awarded for a record between D. and B. and it came into Chancery, and by *mittimus* into C. B. but the *mittimus* mistook the name of C. for D. It was ruled per tot. cur. that it should be amended, and judgment affirmed. But by Doderidge, if the *certiorari* had been ill, it should not be amended. Lat. 217 Mich. 3 Car. Doily v. Broughton.

27. *Quare impedit* to present *ad ecclesiam de W.* It was moved that the writ might be amended, because the plaintiff's title was to the vicarage of the said church, and not to the parsonage, and because it was a writ original, and in point of substance, the court much doubted if it should be amended; for it is clear that the writ was mistaken; for the words *Ad præsentandum ad ecclesiam*, always intend right of advowson of the parsonage; but when the title is to the vicarage only, there is a special writ *Ad præsentandum ad vicariam*, and cited F. N. B. 32. and 15 Eliz. D. 323. but because the attorney gave a note to the curfitor to draw a writ *Ad præsentandum ad vicariam ecclesiæ de W.* and because it is a *peremptory action* in a *qua. imp.* the first six months being past, the party being a purchaser of the advowson, and the misprision happening by default of the clerk in not pursuing his master's directions, it was ordered to be amended. Cro. C. 74. Trin. 3 Car. C. B. Turner v. Palmer.

S. C. cited  
Lev. 2.—  
G. Hist. of  
C. B. 95.  
cites S. C.

28. Plaintiff in a *qua. imp.* against the defendants, who had presented

presented to the church of having *mistook the name of the defendant*, prayed an amendment, because the 6 months being lapsed, they could not bring a new writ without loss of this presentation; but the court denied to grant it, and said that it appears clearly that this was the *default of the party*, and not of the clerk. Freem. Rep. 69. pl. 83. Hill. 1672. C. B. the Lady Essex v. Key's-College in Cambridge.

29. After an *extent and liberate* the writ was *Habere facias terras & tenementa*, instead of *Liberari facias*, which was moved to be amended, and the court ordered it accordingly. 2 Vent. 171. Pasch. 2 W. & M. in C. B. Anon.

6 Mod. 310.  
S. C. held accordingly.  
— Ibid.  
263. S. C. by the name of Buxom v. Hoskins, held accordingly, and the court took a diversity, where a writ is bad

30. The plaintiff obtained judgment in an *ejectment* for two houses, and brought a *scire facias* on that judgment, to shew cause why he should not have execution of one house; the defendant pleaded *Nul tiel record*, and the plaintiff perceiving the fault, moved to amend it. Sed per curiam, this *scire facias* is a good writ, there is no fault in it to amend, and the court will not alter it to fit it for the plaintiff's purpose in this judgment, when it is probable there may be another judgment in *ejectment* for one house, and the defendant having taken advantage of it, it shall not be amended to falsify his plea. 3 Salk. 32. Mich. 3 Ann. B. R. Williams v. Hoskins.

and vitious upon the face of it, and where it is good in the frame of it, but not fitted to that particular purpose, and said that there would be some colour to amend in this case if the defendant had appeared and pleaded some other plea, or had not taken advantage of this slip, so as the proceedings would have been vitious without amendment; and they agreed that wherever an original was amendable, there a *scire facias* would be so too. — 1 Salk. 52. pl. 16. S. C. accordingly. — 2 Ld. Raym. Rep. 1057. S. C. and ibid. 1060. The reporter says *Quære* of this case, because the cases cited by Mr. Williams [who argued for the plaintiff in error, as the reporter did for the defendant in error] seem to be strong to the purpose, and the court (as the reporter says he thought) ruled the matter *hæsitanter*.

S. P. mentioned, and Holt and Powell doubted. 2 Ld. Raym. Rep. 1059. in S. C.

31. If a *formedon* be made for 10 acres where the instructions given are for 20, Holt Ch. J. said he doubted that it could not be amended; for the statute is to cure only mistakes of clerks, which would endanger the reversing of judgments, and not to alter matter of fact by extending it farther than it was before. 6 Mod. 264. Mich. 3 Ann. B. R. obiter.

6 Mod. 229. Mich. 3 Ann. B. R. Brewster v. Weld, S. C. but S. P. does not appear. — The last day of Hill. term, 3 Ann.

32. A *sci. fac.* out of the Petty-bag returned in B. R. to repeal the queen's letters patents granted to Wells was amended, and *Sping*, a man's name, was amended, and made *Spring*, by the instructions given to the clerk of the Petty-bag, and the clerk of the Petty-bag, who made out the writ, was sent for to amend it, because he who made it ought to amend it, and the court examined him as to the truth of the instructions. 2 Ld. Raym. Rep. 1060. Arg. cites Brewster v. Wells.

(absente Holt Ch. J.) upon motion a *scire facias* was amended; and where the judgment was recited as a judgment of the 3d year of the queen, that was amended and made the first, agreeable to the record; but in both these cases the amendments were made before plea pleaded immediately upon the return of the *scire facias*. 2 Ld. Raym. Rep. 1060.

2 Keb. 175. pl. 62. Hill. 18. & 19

33. In a *scire fieri* inquiry in the recital of the judgment, *Curia domini regis* was mistaken for *Nuper eliveri*, and was amended.

ed, because it was a judicial writ, and the mistake in the recital of the record which the clerk had before him. 2 Ld. Raym. Rep. 1058. Arg. cites 2 Keb. 175. Williams v. Moore. Car. 2. B. R. the S. C. and per cur. it was amendable without the help of the late statute of 17 Car. 2. cap. 8. it being a judicial writ.

34. In a sci. fac. on a judgment the *plaintiff's name* was inserted *instead of the defendant's*; it was moved to amend it, as only a mistake of the clerk, but denied, for there is no fault in the writ itself, and it is possible there may be such a judgment. 1 Salk. 52. Hill. 6 Ann. B. R. Vavasor v. Baile.

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35. The court was moved to amend an *elegit*, that *sets forth*, that judgment was given upon the 9th of January, when in fact it was given the 23d of October, and signed the 9th of January. The court was of opinion that it was not amendable, because it might occasion an alteration in a verdict upon a writ of inquiry, for between the 23d of October, and the 9th of January, he might have lands that he had not the 9th of January; sed adjournatur. 10 Mod. 67, 68. Mich. 10 Ann. B. R. Dummer v. . . .

36. A *sci. fac. against the pledges* in a plaint in *replevin* is in nature of a declaration, and consequently amendable. 8 Mod. 313. Mich. 11 Geo. 1. Weldon v. Buckler.

38. A bill was filed against the defendant as an attorney of the court, and the bill by mistake of the plaintiff's attorney did conclude *& inde producit sectam*, &c. instead of *& inde petit remedium*, &c. The judges ordered it to be amended upon payment of costs, and to be taxed nisi causa, and the rule was afterwards made absolute upon an affidavit of service. The instructions here given to the plaintiff's attorney were to file a bill, which he hath not done; but he has made it a declaration by this wrong conclusion, and not a bill according to his instructions. Barnes's Notes of C. B. 3. 4. Mich. 6 Geo. 2. Clarke v. Cotton an attorney.

S. P. and leave given to amend upon payment of costs, though the court seemed to think the amendment unnecessary. Barnes's Notes of

C. B. 17 Pasch. 12 Geo. 2. Mason v. Littlehales, attorney.

38. A *scire facias against a bail*, and all the proceedings thereupon were ordered to be amended by the record in the original action, by inserting the word (*Merchant*) instead of (*Mercer*), being the defendant's addition, after issue joined upon nul tiel record. Barnes's Notes of C. B. 6. Hill. 7 Geo. 2. Swetland v. Beezley & Browne.

39. On motion to amend the original writ and declaration, by making the plaintiff a co-administrator instead of executor, it was said per cur. the doctrine of amendment of original writs (which is not by the common law, but per stat. 8 Hen. 6.) is settled in the books; 1st, No amendment of an original can be made, unless for *nescience or misprision of the clerk*. 2dly, There must be something to amend by. In this case both these requisites are wanting. The court will take care that the suitor shall not suffer by the officer's error; but had the mistake been the attorney's, the party must be put to his remedy against him; the court could not amend it. Here the writ is agreeable to the instructions, so there is nothing to amend by. Barnes's Notes of C. B. 15. 16. Mich. 12 Geo. 2. Lamb v. Gibson.

(B. a)

## (B. a) Teste and Returns of Writs amended.

1. **I**N *trespass distress* issued 15 Trin. returnable 15 Mich. and the roll was from 15 Trin. to 15 Hill. and at 15 Mich. the plaintiff appeared and pleaded to the issue, and found for the plaintiff; and this matter alleged in arrest of judgment, and were awarded to replead, and was not amended. Br. Amendment, pl. 111. cites 46 E. 3. 19.

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Br. Return  
de Brief, pl.  
42. cites 14  
H. 4. 34.—

2. *Process* issued to the coroners, and four returned the *ven. facias*, and 3 only returned the *habeas corpora*. It seems to be ill, but it was admitted there, because he appeared. Br. Repleader, pl. 13. cites 14 H. 4.

Br. Office & Off. pl. 11. cites S. C.—Error was assigned that the *venire facias* was returned by two coroners, whereas at the time of the writ awarded there were 2 other coroners, and the return ought to have been in the name of the 4 coroners; but adjudged this was aided by the statute, which aids misreturns and insufficient returns, and this was but a misreturn. Cro. J. 383. pl. 12. Mich. 13 Jac. in the Exchequer-Chamber, Lamb v. Wiseman.

3. *Witnesses* were returned dead. The defendant said that they were alive, and prayed that the sheriff be examined, and so he was, and said that he nor his under-sheriff did not return it, but such a clerk, by which he was suffered to amend it, and returned them summoned. Br. Examination, pl. 34. cites 37 H. 6. 11.

4. Where writ of *exigent* is returnable *mensse Mich.* and the roll is 15 Mich. or e contra, there the writ shall be amended, and made to accord with the roll. Br. Amendment, pl. 71. cites 7 E. 4. 15.

5. In *trespass distress* with *nisi prius* was returnable 15 Michaelis, and the roll was *mensse Michaelis*, and the inquest by this was taken in Pais, which matter was alleged in arrest of judgment; and by the opinion of the justices the writ of *nisi prius* shall be amended, and reason good; for the roll is the warrant of the writ, therefore the writ shall be amended, according to the roll or record, and not the roll; for the roll shall not be ordered by the writ, but the writ by the roll. Br. Amendment, pl. 71. cites 7 E. 4. 15.

Br. Record,  
pl. 77. cites  
S. C.—  
3 Rep. 157.  
a. cites S. C.

6. If *distringas juratores* be returned 15 Pasch. and the roll is *Tres Septimanas Paschæ*, and the jury at 15 Paschæ, this is error, and shall not be amended; for this is not misprision of the clerk, but misprision of the justices, who ought to have regarded the roll, and not the writ; for this is the record for the original; and the docket of the prothonotary is not of force but during the term for which it shall serve, and after the term ended the roll is the record, and not the docket. Br. Amendment, pl. 87. cites 2 R. 3. 11.

If on sug-  
gestion on  
the roll,  
process be

7. Where a *venire facias* is returned by the coroner, when it ought to be returned by the sheriff, the trial is wrong, and not remedied by any statute of Jeofails. 5 Rep. 36. in Baynham's case,

case, said per Wray to be adjudged in the case of Goodwyn v. Franklyn. awarded to the coroners, and

then the sheriff either returns the panel or tales, it is erroneous, because not collected by the proper officers, and therefore they are not the proper justices facti of that cause, and it appears on the record that the return is otherwise than the court has directed. G. Hist. of C. B. 135.

8. In covenant a writ of inquiry was awarded, by the roll returnable 15 Pasch. and it was made returnable *menſe Paſch.* and the inquisition taken before 15 Pasch. And upon judgment for the plaintiff in C. B. error was brought in B. R. and after good deliberation awarded that the writ be amended by the roll, and judgment affirmed. Cro. E. 761. in pl. 33. ſays the precedent was ſhewn as Paſch. 30 Eliz. in B. R. Jeff. v. Wilſon. Mo. 712. pl. 998 cites S. C. accordingly. — In error of a judgment in affumpſit, it was aſſigned that

the writ of inquiry of damages was awarded by the roll returnable *die Martis poſt tres Trin.* and the writ was returnable *die Mercurii poſt tres Trin.* and the writ was returned ſerved, and the inquisition taken 26 June, which was *die Martis poſt tres Trin.* and ſo varied from the roll, and the judgment erroneous. But it was answered, that it was the default of the clerk to make it returnable variant from the roll, which is the warrant thereof; and all the juſtices and barons, on view of the record of Jeff. v. Wilſon, awarded that it be amended by the roll. Cro. E. 760. pl. 33. Paſch. 42 Eliz. in Cam. Scacc. Wolley v. Moſely. — Mo. 711. pl. 998. S. C. and the court held it the default of the clerk, and amendable by the ſtat. 8 H. 6. — S. C. cited Arg. 2 Ld. Raym. Rep. 1059. accordingly; but that otherwiſe it had been if it had been executed upon *die Mercurii*, the day the writ was returnable.

9. Error was aſſigned, that in treſpaſs the *venire facias bore teſte on a Sunday*; but it was held that this was remedied after verdict by ſtat. 18 Eliz. Mo. 684. pl. 944. Hill. 32 Eliz. in the Exchequer-Chamber, Short v. Hellyar. [ 354 ] Cro. E. 183. pl. 6. S. C. ſays it is

helped by ſtat. 32 H. 8. and judgment was affirmed. — S. C. cited by Tanfield, J. by the name of Short v. Arundel, as amended after trial. Cro. J. 162. in pl. 16. — S. C. cited Mo. 465. in pl. 657. — S. P. cited per cur. as ruled accordingly. Cro. E. 467 (bis) pl. 24. — Cro. E. 203. pl. 35. it was ſaid that it is uſual in C. B. if a judicial proceſs bears teſte upon Sunday, to amend it. — S. P. where a *venire facias* was teſte of a Sunday, and held amendable, it being only the default of the clerk, and miſawarding of proceſs, which is aided by ſtat. 32 H. 8. and 18 Eliz. and judgment for the plaintiff. Cro. J. 64. pl. 3. Paſch. 2 Jac. B. R. Dolphin v. Clarke.

10. If a *ven. facias* bears *teſte the day that it is returnable*, this is amendable by the roll. Mo. 599. pl. 826. Trin. 37 Eliz. Adams v. Albon.

11. *Venire facias* was returned the firſt day of the term, and the roll gave day before the term, and iſſue was joined and tried thereupon. Per cur. The roll is the warrant for the writ, and the writ iſſued without warrant of the roll, and is not aided by ſtat. 18 Eliz. For the ſtatute aids diſcontinuance, miſcontinuance, and miſconveying of proceſs. Mo. 402. pl. 535. Paſch. 37 Eliz. Beſey v. Hungerford. Cro. E. 433. pl. 42. Hungerford v. Veſey, S. C. and it was held clearly to be erroneous. Sed adjournatur. — But if

it does not appear that any writ was awarded, it is aided by the ſtatute; but not an ill writ. Ibid. — G. Hiſt. of C. B. 131. ſays, that the award of the *venire* muſt be to a day in the ſame term, or the next term; but however it muſt be in term, otherwiſe it is erroneous, becauſe this is not ſuch a diſcontinuance as is aided by the verdict, ſince it is an error in the court in awarding the proceſs, which makes it utterly uncertain when or where the parties ſhould appear to receive judgment, and it is an act of the court which is erroneous, and not a miſentry of the clerk, which the ſtatutes do not intend to aid.

12. In debt the *venire facias* was awarded upon the roll returnable *die Martis poſt 15 Trin.* and the writ was in facto returned *die*



*die Jovis post 15 Trin.* and this was assigned for error. Sed non allocatur, because it was only misawarding of process, and remedied by the statute of Jeofails, and the judgment was affirmed. Mo. 696. pl. 967. Mich. 38 & 39 Eliz. in Cam. Scacc. Fallowe v. Thornye.

A writ of proclamation on an exigent was returned served, but the sheriff's name was not put thereto. Adjournatur.

13. Where the *christian name of the sheriff* was omitted in the return of an original writ the court refused to amend it, the record being made up, and because an erroneous outlawry would be reversed thereby. Goldsb. 113. pl. 3. Mich. 39 & 40 Eliz. Broughton v. Flood.

A blank for the return of the venire facias was left in the record of nisi prius, and this being moved in arrest of judgment a rule was made to shew cause,

14. A venire facias was awarded upon the roll thus, viz. *Idea præceptum est vicecomiti quod venire facias 12 quod sint hic* and left a blank for the day of the return, so as there was no day for the return upon the roll, though the day of return was expressed in the venire facias. Popham and Fenner held that the venire facias ought to have a day certain upon the roll, for that is the warrant for the venire facias, and if it differs from it, it is error and not amendable; but Gawdy held it amendable. Et adjournatur. But afterwards the judgment was affirmed. Cro. E. 553. 554. pl. 5. Pasch. 39 Eliz. B. R. Shere v. Dickenson.

which, on hearing was discharged. For it is constant practice to leave a blank; the award of the venire facias is no part of the issue, and is amendable by the venire facias itself. Barnes's Notes in C. B. 345, 346. Pasch. 12 Geo. 2. Bryan v. Smith.

S. C. cited by Powis J. [355] 2 Ld. Raym. Rep. 1064.

15. The venire facias was returnable *die Sabbati post octab. Trin.* and the distringas issued bearing date the day after *crast. Trin.* and trial thereupon, and verdict for the plaintiff; and this was moved to be ill, because it was without warrant, being before the return of the venire facias. But because by the roll the venire facias was awarded returnable *crast. Trin.* which is the warrant to make the venire, and was well awarded, and it was the default of the clerk who did contrary to the roll, it was ruled to be amended. But Popham said, that if the trial had been upon the venire it was erroneous and not amendable. Cro. E. 572. pl. 11. Trin. 39 Eliz. Rogers v. Bird.

16. The distringas jurat. bore teste the same day with the venire facias, though in its nature it issues after the venire facias returned, yet it was amended in this point also; for it was only the misprision of the clerk. Yelv. 64. Pasch. 3 Jac. B. R. Nevil v. Bates.

S. C. cited by Powell J. 2 Ld. Raym. Rep. 1067. — Ibid. 1069. S. C. cited by Holt Ch. J.

17. The venire facias was made returnable *quind. Hill.* and bore teste 12 Feb. which is the last day of Hillary term. And yet per curiam, it shall be amended in the date of the teste, viz. to issue out before the return of it, and this in favour of trials; for it is only the default of the clerk. Yelv. 64. Pasch. 3 Jac. B. R. Nevil v. Bates.

to be a plain mistake of the clerk, and the teste being after the return was ill, being to distrain jurors not summoned.

Venire facias bore teste 26 June, which was the last day of Trin. term, and so the return is before the teste, and the distringas ill awarded; but resolved that being only a default in a judicial process it should be amended. Cro. J. 442. pl. 15. Mich. 15 Jac. B. R. Harrison v. Mercall.



Error assigned was that the *venire facias* bore date 12 Feb. and was returnable die Sabbati post octab. Purificationis, which is before the teste. Sed non allocatur; for being a judicial writ, and the fault of the clerk, it shall be amended. Cro. C. 38. pl. 4. Trin. 2 Car. in the Exchequer-Chamber, Aylesworth v. Chadwell.

18. The teste of a *venire facias* was 12 June returnable tres Trin. which was the same day that the teste was, and after verdict it was moved to be amended and made according to the roll, and it was amended accordingly. 2 Brownl. 102. Mich. 9 Jac. C. B. Anon.

19. In account the *venire facias* was returned by the coroners thus, viz. Executio istius brevis patet in quadam schedula huic brevi annexa, and the panel and names of the jurors between the E. of Cumberland plaintiff and T. H. defendant in a plea of debt instead of in a plea of account, and yet after verdict day was given to the coroners to amend their return. 2 Brownl. 108. Mich. 9 Jac. Earl of Cumberland v. Hilton.

20. F. was indicted and traversed it, and found against him; exception was taken because upon the back of the writ of *distingas* it was returned Executio istius brevis, &c. but the sheriff's name was not put to it; but ruled good and awarded to be amended, if it was not good. Cro. J. 527. pl. 5. Pasch. 17 Jac. B. R. Fitz-Hughe's Case.

21. In debt, the parties being at issue the awarding of the roll was of a *venire facias*, returnable die Martis post crastin. Purificationis, but it was made returnable die Sabbati post octab. Purific. After judgment this was assigned for error. Sed non allocatur; for being a judicial writ, and the fault of the clerk, it shall be amended. Cro. C. 38. pl. 4 Trin. 2 Car. in the Exchequer-Chamber, Aylesworth v. Chadwell.

22. An attorney directed his clerk to make a *Ca. Sa.* returnable in Trinity term, the last return whereof was on the 25th of June, and the clerk by mistake wrote the 25th of July. Glyn Ch. J. held that if it ought to be amended it must be by the common law, and he thought there was no colour for the amendment of it. 2 Sid. 7. 12. Mich. 1657. Smithsby v. Lenthill.

was the question; and it was granted that a writ of enquiry is amendable. Godb. 78. for there is the roll by which it may be amended; so a *venire facias*, &c. for there is an award by which it may be amended, and in the present case the court would amend the *fieri facias* if it could; but there is no award upon the roll for the *fieri facias* by which the amendment can be made. Comyns Rep. 60. pl. 39. Trin. 11 Will. 3. B. R. Juxon & Ux' v. Naylor.

A *fieri facias* bore teste on a day out of term, and whether it was amendable or not, for there is

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The *venire* bore teste 24 Feb. which is out of term returnable in the term, and was amended. Yelw. 64. in case of Nevil v. Bates, says that a precedent was shewn to that purpose.

23. A *fieri facias* was tested 7 Feb. 26 Car. 2. by misprision of the clerk, it being teste F. North, whereas Sir F. North was not chief justice before Hillary term 27 Car. 2. It was amended by order of the court. 2 Jo. 41. Mich. 27 Car. 2. C. B. Smith v. Harward.

24. In *homine replegiando* of one in whom the defendant claimed property, the sheriff returned that he had replevied the body, but does not say, the body in which the defendant claimed property; whereupon the sheriff was ordered to amend his return. 3 Mod. 120. Hill. 2 & 3 Jac. 2. B. R. Sir Tho. Grantham's case.

25. In

25. In *action for words*, after declaration delivered the defendant, on searching for *plaintiff's instructions* to the curfitor, found they *varied materially from the original*, and thereupon pleaded the statute of limitations. The master of the rolls upon petition granted a new original, which should warrant the declaration, and it was filed in court, but the commissioners of the great seal set the same aside, and *ordered an original to be taken out according to the first instructions to the curfitor*; and on motion the court of C. B. ordered the last original to be filed. 2 Vent. 130. Hill. 1 & 2 W. & M. in C. B. Chase v. Etheridge.

26. The teste of an *original writ* is not amendable; per Powel, J. 2 Ld. Raym. Rep. 1066. and said that it was so resolved in the House of Lords, with the concurrent opinion of all the judges in the CASE OF MY LD. JEFFERIES, and that upon consideration of Gage's case in 5 Rep. 45. b. and adds in a crotchet [that a judgment given in Wales upon the authority of Gage's case was reversed; and that upon that occasion the record of that case was searched for, and found not to warrant the report. And Holt Ch. J. said that the record of that case is in Co. Intr. tit. Err. p. 9. 250. and the judgment of the court is contrary to the report, for the writ was not amended, but the fine was reversed. And as I have heard Twisden J. say, the estate is enjoyed under that judgment ever since.]

27. It was moved to amend the writ of *habeas corpora jurator* after trial *returnable on Wednesday next after 8 days of the Purification*, instead of Wednesday in 15 days of Easter; court made a rule to shew cause, which was afterwards made absolute upon hearing counsel on both sides. Barnes's Notes of C. B. 7. Pasch. 7 Geo. 2. Waldo v. Harison.

28. It was moved after trial to amend the *jurata* in the record of nisi prius by *making the return in the award of the habeas corpora of a day certain*, instead of a general return; a rule was made to shew cause, but afterwards discharged, the court saying that it need not be amended, for it is remedied by the statutes of Jeofails; but on further consideration the judges gave their opinion seriatim, and declared that the *jurata* might be amended by the habeas corpora, and ordered the same accordingly. Rep. of Pract. in C. B. 101. Pasch. 7 Geo. 2. Walthoe v. Harrison.

## [ 357 ] (C. a) Misnomer, and other Defects in the Count, amended.

See (B) pl.  
20.25.—See  
(T) supra.

1. **I**N *quare impedit* the king counted of resignation by the hands of *f. bishop of W. ordinary of that place*, and did not say *then ordinary of that place*, and it was amended per judicium. Br. Amendment, pl. 109. cites 38 H. 6. 33.

2. In *rationabili parte bonorum* against three executors, Cateby demanded judgment of the count; for the custom is there, that if the baron dies without issue the same shall have the moiety of the goods,

goods, and if he has issue then, but the third part, after the debts and funeral expences paid; and the feme plaintiff has demanded the moiety, and has not alleged that the baron died without issue, and by favour of the justices it was amended. Br. Rationabili Parte, pl. 5. cités 7 E. 4. 20. 21.

3. In *assumpsit* against B. senior and B. junior, after verdict it was alleged in arrest that the declaration upon the file supposes the promise to be made by B. sen. only; but the roll and the record of nisi prius, and all the after-proceedings were well laid to be by both, and that so was the paper-copy under the counsellor's hand. All the court, præter Fenner, held it amendable; for as Brian said 10 H. 7. 25. papers are now as records; so as when it appears that the paper-declaration is good that the promise was by both, it is the fault of the clerk to enter it on the file to be done by one, and so adjudged to be amended. Cro. E. 258. pl. 37. Mich. 33 & 34 Eliz. B. R. Ramsey v. Bird sen. & Bird jun.

4. Tenant in tail demised to A. and his assigns for the lives of 3 persons. Afterwards A. made an under-lease to B. and his assigns to the use of C. for 99 years, if the said 3 lives should so long live, *virtute cujus quidem dimissionis idem C. possessionatus fuit, &c.* After a verdict in ejectment it was moved in arrest of judgment, that the plaintiff sets forth *virtute cujus dimissionis* he was possessed, whereas he came into the possession by limitation of an use, and therefore he should have said *et vigore statuti, &c.* and these were held to be faults in substance, and not in form, and judgment for the defendant. Cro. E. 407. pl. 19. Trin. 37 Eliz. B. R. Baker v. Seale.

5. Motion in arrest of judgment in ejectment, because the declaration was that the two defendants *intravit, dejecit, &c.* the plaintiff, where it should have been *intraverunt, dejecerunt, &c.* All the justices (absente Fleming) held it to be amendable, it being apparent misprision of the clerk. Cro. J. 306. pl. 1. Mich. 10 Jac. Odingsells v. Derby & Jackson.

Yelv. 224.  
S. C. ad-  
judged ac-  
cordingly.  
—2 Bulst.  
35. Oding-  
ton v. Dar-  
by, S. C. ad-  
judged by

3 justices, absente Fleming Ch. J. ——— Brownl. 149. S. C. adjudged accordingly. ——— Jenk. 325. pl. 42. S. C. adjudged and affirmed in error. ——— S. C. cited 2 Ld. Raym. Rep. 1068. by Powell J. who said that it does not appear certainly what the mistake was, and the singular number for the plural might be very material.

In covenant against 2, the plaintiff declared *Quod teneat conventionem*, instead of *teneant*. The court ordered it to be amended; and it was said, that of late days it had been done in case of a word mistaken in an original, as in ejectment *divisit* for *demisit*. 2 Vent. 173. Pasch. 2 W. & M. in C. B. Cook v. Rumney.

6. Assumpsit by J. T. executor, in consideration that N. the testator would deliver to the defendant upon request 40 l. he promised to repay it at such a day, and the declaration was *Quod idem N. (instead of J. the plaintiff) dicit in facto, quod ipse idem N. delivered to him the 40 l. &c.* Resolved that the declaration was ill, and insensible, *quod idem N. dicit in facto*, because he is a dead person, and it being the matter and substance of the declaration, and no precedent matter to induce thereto, it cannot be amended, and therefore adjudged against the plaintiff, *quod nihil capiat per*

S. C. Gilb.  
Hist. of C. B.  
111. ———  
Debt by A.  
as admini-  
stratrix of

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G. upon a  
charter-  
party, in  
which were

several co-venants between him and the defendant. Billam. Cro. J. 587. pl. 9. Mich. 18 Jac. B. R. Thomas v. Willoughby.

The declaration was right till she came to the assignment of the breach, and then it was *Idem in facto dicit*, instead of *Eadem A.* Upon demurrer it was objected, that here was no breach assigned by this mistake of the name of *G. the intestate*, for the name of *A. the administratrix*. But the court held clearly, that as all the declaration besides was right, and concluded right, *Quod eadem A.* profert in curia literas administ' it was merely a fault of the clerk, and amendable by the statute of H. 6. 2 Lev. 117. Mich. 26 Car. 2. B. R. Rea v. Barnes.—S. C. cited Comyns's Rep. 567. pl. 244. Pasch. 10 Geo. 2. C. B. in the case of Harvey v. Stokes, and S. P. admitted; but it was there held per cur. that though a misnomer of the plaintiff or defendant be amendable, yet the mistake of the name of a 3d person is not aided or amendable.

7. In *trespass* the plaintiff set forth that the locus in quo, &c. was copyhold, whereof J. S. was seised in fee by copy, and that the land descended to his daughters, who leased to the plaintiff. The issue was joined upon a collateral matter, and verdict for the plaintiff; and though it was adjudged that the plaintiff had not made out a good title to J. S. because he did not shew a grant of the copyhold to him, yet this being but matter in form, was helped by the statute of Jeofails. Cro. C. 190. pl. 19. Pasch. 6 Car. B. R. Sheppard's case.

8. The plaintiff declared of a demise to the defendant for 13 years, rendering 40 l. quarterly, not saying annuatim. Upon Non est factum pleaded the plaintiff had a verdict; but after the plea the plaintiff amended the declaration by putting in the word (annuatim.) Upon a motion for the defendant to have it examined, it was held by Keyling Ch. J. and Wyndham J. that it was no more than what was implied before. And by Twisden J. the defendant should have demanded oyer of the deed; but having pleaded Non est factum, he is not prejudiced by this amendment. Raym. 160. Hill. 18 & 19 Car. 2. B. R. Rymes v. Baker.

9. The declaration was, *Wilhelmus Patison queritur de Will. Milton, &c. pro eo videlt' quod cum Wilhelmus Patison (instead of Milton) indebitatus fuit Willielmo Patison.* After a verdict for the plaintiff it was moved to amend it, for it was a plain mistake of the clerk, to make the plaintiff indebted to himself; and the court ordered it should be amended accordingly. 4 Mod. 161. Hill. 4 & 5 W. & M. in B. R. Patison v. Milton.

5 Mod. 523. S. C. argued, but no judgment.—

Carth. 401.

S. C. and the court denied to amend it.—

Comb. 394.

S. C. but no judgment;

but says the

plaintiff did not proceed upon this verdict; for that the counsel in the cause assured the reporter that they were satisfied it was a fatal error, and not amendable.—12 Mod. 125. S. C. says the court would have amended it if they could, but the inconveniences of doing it would be

10. After verdict in ejectment the plaintiff moved to amend his declaration, wherein he had counted of a demise 10 April 1697, instead of 1696; for 1697 was not come at the time of the trial; but it was denied, because if it should be granted it altered the issue, and made another title. But the court agreed, that in a judgment by \* confession on a warrant of attorney it might be amended in ejectment, because without such amendment the agreement and intent of the parties could not be fulfilled. 1 Salk. 48. pl. 6. Pasch. 9 W. 3. B. R. Puleston v. Warburton.

be very great, and judgment was staid; but that after it was agreed by consent to amend, and the judgment to be for security as to the costs, &c. and the defendant to take a new declaration, and defendant to deliver possession if verdict be against him, and not bring a new writ of error.

\* Carth. 401. in the case above, says a rule of court was produced in a case of Parr v. Cawley, where after error brought on a judgment by confession in ejectment, such amendment was made in the declaration; but that being a judgment by consent of parties, was held to be no authority in the principal case.

11. Assumpsit, &c. against J. G. knight. The defendant pleaded in abatement that he is a knight and baronet. The plaintiff replied that he is a knight. [\* only,] &c. and moved to amend his declaration upon payment of costs, all being in paper, and that the action being by bill the addition was not material, it not being within the statute of additions; but it was denied, because there was nothing to amend by, and the defendant had taken advantage of the fault. 1 Salk. 50. pl. 12. Pasch. 2 Ann. B. R. Lepara v. Germain.

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\* 3 Salk. 235. pl. 1. S. C. accordingly — \* 2 Ld. Raym. Rep. 859. Lapiere v. Germain, S. C. accordingly.

12. Upon a common clausum fregit the plaintiff declared against the defendant as administrator, and he pleaded that administration was never committed to him. The plaintiff's attorney moved in the treasury, that the plaintiff might amend his declaration upon payment of costs, by declaring against the defendant as executor, which, upon hearing defendant's attorney, was ordered. Barnes's Notes of C. B. 67. Hill. 7 Geo. 2. Brown v. Shipman.

## (D. a) Misnomer, and other Defects in Pleadings amended.

See (B) pl. 27.

1. *ASSISE* by J. S. and W. N. The defendant pleaded that J. N. died after the last continuance, where it should be W. N. and the best opinion was that it shall not be amended; for the statute was made in favour of clerks and officers, so that misprision of the clerk shall be amended; but contra of plea of the party; for this is made by himself and his counsel, and is no default of the clerk. Br. Amendment, pl. 74. cites 18 E. 4. 13. and 20 E. 4. 6.

2. Sulyard said that a \* *trespass* was sued [traverse was tendered] in Chancery by 3, and after they shewed feoffment made to 4, to have the land in farm; and by all the justices, this is misprision; for the feoffment was by deed; but it did not appear if the clerk saw the deed or not. Br. Amendment, pl. 74. cites 18 E. 4. 13. and 20 E. 4. 6.

\* All the editions of Brooke are (trns' suit sue,) which is (trespass was sued;) but all the year-books are (traverse suit tend'.)

3. Misnomer of the christian name of one of the defendants in the attorney-general's replication in an information, was moved after verdict for the defendants to be amended before judgment entered, to prevent error in the judgment. But the court thought it could not be, because they conceived there was no issue joined. Sty. 167. Mich. 1649. Birmingham-Town's case.

Ibid. in a note there says, the like resolution was in an action on 2 bonds, where issue was joined as to one bond, and not as to the other. Lyne v. Green.

4. In assault and battery there had been 2 *several pleas of son assault*, and *issue was joined in the last*, but *left out of the first*, the court held it amendable by the statute of Jeofails, because it appears to be the clerk's mistake, and besides, as the issue is joined in the latter plea, that may also have reference to the first. Rep. of Pract. in C. B. 106. Trin. 7 & 8 Geo. 2. Eason & Ux. v. Wilkins & Ux.

5. It was moved to amend a *plea in abatement*, by putting in *culpabilis* instead of *capitalis*, for that it appears to be only a misprision of the clerk. But by Eyre Ch. J. pleas in abatement have generally been denied to be amended, because they are dilatory, and go not to the right of the action, and it will be dangerous to make a precedent, and therefore the amendment was denied. Rep. of Pract. in C. B. 29 Pasch. 12 Geo. 1. Dockary v. Lawrence.

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See (X) supra.

(E. a) Misnomer, and other Defects in the Plea, Imparlance, and Nisi Prius Rolls, amended.

1. *Trespas against M. and G.* and the *process* was continued against *M. and H. and G. omitted*, and because the roll at the first day of the process was good, therefore the roll was amended; quod nota. And yet per Chell. judicial writs which vary are often amended, but seldom the roll. Br. Amendment, pl. 22. cites 44 E. 3. 18.

Br. Relation, pl. 41. cites 11 H. 6. 27.

2. *Præcipe quod reddat against R. T.* who pleaded in bar the deed of one *R. S.* with warranty, which deed the same *R.* in curia profert, and after nisi prius passed, it was pleaded in arrest of judgment, that this same *R.* who made profert of the deed, shall be intended the last *R.* viz. he whose warranty was pleaded. And per cur. because bar shall be taken by reasonable intendment, so that it shall be taken this *R.* who was tenant, therefore per cur. it was amended, and entered per chartam quam *R. T.* the tenant profert; quod nota, bar amended. Br. Amendment, pl. 83. cites 11 H. 6. 22.

3. In writ of mesne the plaintiff prescribed in the acquittal against the defendant and his ancestors whose heir he is, and it was entered accordingly in one roll, and in another roll (*cujus hæres ipse est*) was wanting, and it was amended. Br. Amendment, pl. 108. cites 39 H. 6. 31.

4. In a writ of partition against 2, one pleaded to issue, and on the record of nisi prius his name, by the negligence of the clerk, was left out, but the principal record was perfect. This was held to be amendable. Pasch. 9 Eliz. D. 260. Wotton v. Cook & Temple.

5. In trover, &c. the plaintiff declared, that he was possessed de quo spadone; una equa pretii 53 shillings and 4 pence, so that there



there was no price added to the gelding. The court was divided, 2 held it matter of form, and 2 held it matter of substance, but upon viewing the roll it appeared to be *de uno spadone & de una equa pretii 53 shillings and 4 pence*, so that the price extends to both, and so the record of nisi prius was amended by the roll. Cro. J. 129. pl. 2 Mich. 4 Jac. B. R. Wood v. Smith.

6. A challenge being made to the sheriff after issue, and confessed, the *ven. fac.* was awarded to the coroner, but the roll of nisi prius was, that the *ven. fac.* was awarded to the sheriff, and the distringas was awarded to the sheriff, and trial thereupon had, which cannot be, because the *ven. fac.* was awarded to the coroners, and therefore it was moved in arrest of judgment; but held, that because the roll of nisi prius was a *misprision*, and ought to be warranted by the record (though in truth it is a record made after the nisi prius and the trial) it should be amended, and judgment for the plaintiff. Cro. J. 353, 354, pl. 8. Mich. 12 Jac. B. R. Musgrave v. Wharton.

Yelv. 218.  
Hill 9 Jac.  
S. C. but  
S. P. does  
not appear.  
—Hob. 4.  
pl. 7. S. C.  
but S. P.  
does not ap-  
pear.—  
Cro. J. 331.  
pl. 13.  
Wharton v.  
Musgrave,  
S. C. but

S. P. does not appear. ——— Jenk. 291. pl. 32. S. C. but S. P. does not appear.

7. The plaintiff exhibited a bill against the defendant one of the clerks of B. R. and after a verdict it was moved in arrest of judgment, for that the bill was not filed; the court seemed inclined that this was not helped by the statute. Brownl. 81. Weeks v. Wright.

Hob. 134.  
pl. 178.  
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Wike v.  
Wright,  
S. C. says

there was no resolution whether this was within the equity of the stat. 18 Eliz. of want of an original writ (which the bill is in this case, being against an attorney;) for it was proved by oath that there was a bill, and that the defendant had accepted and subscribed it, and it was entered in hæc verba on the roll. — S. P. but though the bill was not filed, yet it appeared to the court that the tenor of the bill was entered of record in hæc verba; the court thought this remedied by the statute of Jeofails as being *in nature of want of an original* after verdict; but because it had been ruled otherwise in ROOD'S CASE, the court would advise. But there is a nota that it had been since adjudged in C. B. and also in the Exchequer Chamber upon error out of B. R. upon want of a bill there, to be cured by verdict, yet the words of the statute are (Want of an original writ.) Hob. 130. pl. 169. — The want of a bill being the original was taken to be within the intent and meaning of the statute 18 Eliz. and remedied by the equity thereof. Hob. 264. pl. 244. adjudged in Cam. Scacc. Trin. 17 Jac. Willis v. Woodhouse. — S. C. cited by the name of WELLS v. WOODHOUSE, by Hobart Ch. J. as resolved accordingly, and said that it had been often so adjudged in C. B. in the case of an attorney plaintiff or defendant. Hob. 281, 282.

After a verdict it was moved in arrest of judgment, that there was no bill upon the file. But per tot. cur. this is helped by the stat. 18 Eliz. for the bill on the file is *in nature of an original*, and the want of this is helped by the statute, and judgment for the plaintiff. Jo. 304. pl. 13. Mich. 8 Car. B. R. Griggs v. Parker. — Cro. C. 282. pl. 24. Parker v. Grigson, S. C. adjudged for the plaintiff.

8. If the plea roll be right, the roll of nisi prius may be amended; for the plea roll shall controul the nisi prius roll; and it is usual to amend the nisi prius roll, and to give the true judgment; agreed without question. 2 Roll. Rep. 211. Mich. 18 Jac. B. R. in case of Hunt v. Athill.

9. Trover and conversion alleged to be in London, and the trial was in Middlesex, but it seems the declaration upon the file was of a conversion in Middlesex, and the imparlance roll was right, and so was the issue roll, but the nisi prius roll was wrong; whereupon the plaintiff prayed that the nisi prius roll might be amended. Per Hale Ch. B. if the bill be right upon the file, and the imparlance

roll right, the *issue roll* or the *nisi prius* may be amended by them, for they are but transcripts of the other; but if the difference be such as to alter the *issue*, there they cannot be amended; for then it is another thing that is tried than ought to be tried. Freem. Rep. 325. pl. 404. Trin. 26. Car. 2. Vernon v. Yeeds.

In debt for practising physick without licence, exception was taken that the action was brought Hill. 5 W. & M. and the entry was Mich. 8. which was 2 years

10. The memorandum was general of Easter term last past, which referred to the 1st day of the term, and so the action appeared to be brought before the cause of action accrued. It was moved to amend it, and make it die Mercurii proxime post mensem Paschæ (which was after the cause of action accrued) upon affidavit that all the process issued after the 1st of May. But the court denied to amend it, though all was on paper, because it came after the defendant had pleaded in abatement, and a respondeas ouster awarded thereupon, and a demurrer by the defendant for this cause, so that it is now too late. Ld. Raym. Rep. 324 Hill. 9 W. 3. Burges v. Periam.

after the queen's death, and the memorandum was that they prosecute for the king and the late queen; but Holt Ch. J. answered, that it was no part of the declaration, and might be amended. Ld. Raym. Rep. 682. Trin. 13 W. 3. the president and college of physicians v. Salmon.—1 Salk. 451. pl. 2. S. C. but S. P. does not appear.—5 Mod. 327. S. C. but S. P. does not appear.

The plea roll may be amended by the imparlance roll, because it is but a recital, but not by the nisi prius roll

11. The imparlance roll cannot be amended by the plea roll or nisi prius roll; for the imparlance roll is the original declaration, and the plea roll is no more than a recital of the imparlance roll, and therefore it begins with an alias prout patet, and it is no more than the count of the 2d term, to which the defendant pleaded Ore tenus; and the nisi prius roll is but a transcript of the plea roll to carry the issue into the country. G. Hist. of C. B. 116.

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which is but a transcript from the plea roll, if the plaintiff or defendant be well named in the beginning of the record, but afterwards be mistaken, and the name is idem Jonaus, this shall be amended, because that is but a mistake in syllable by the apparent vitium scriptoris, which is the intent of the statute to amend.

G. Hist. of C. B. 117.

Carth. 506. S. C. accordingly; for if it was not amendable, then the Ch. J. had no authority to try the cause.—

12 Mod. 274. S. C. but per

12. The *distringas* and *jurata* were returnable a die sanctæ Trinitatis in tres Septimanas nisi Johannes Holt Miles, &c. 27 die Junii, &c. prius venerit; the 27th day of June was the morrow after tres Trin. (so as the *nisi prius* was after the day in bank) but the plea roll was right, the award there being tres Mich. The court held this not amendable, but agreed that where the *distringas* or *jurata* are right, the nisi prius roll may be amended by the plea roll, so as it does not alter the point in issue. 1 Salk. 48. Mich. 11 W. 3. B. R. Child v. Harvey.

Holt Ch. J. though the day of the return of the postea should be mistaken, yet if the cause was tried on the right day, it would be good; but here the day of nisi prius being an impossible day, and the authority of the judge confined to it, a trial on another day will be without authority, and therefore not amendable. If the *distringas* and *jurata* had been right, the nisi prius roll might have been amended, as was in Sir R. Barnard's case, wherefore here the trial was set aside.—Ld Raym. Rep. 511, 512. S. C. & S. P. by Holt Ch. J. accordingly, and in much the same words. And Holt said he remembered one POOLEY'S CASE a long time ago, where in trover and conversion the day of nisi prius was die Lunæ in mensem Paschæ, being Sunday, and for that reason after a trial had, and verdict was set aside.

13. It was moved to amend the *entry of bail in the Filacer's book* by making it agreeable to the instructions, viz. *Insult* instead of *Aff'*, and ordered to be amended, *Nisi*. Rep. of Pract. in C. B. 74. Mich. 6 Geo. 2. Fagget v. Van Thienmen.

14. And the *recognizance* taken between the same parties being in *case*, it was moved to amend it and make it in *assault* agreeable to the writ; and the court ordered the same accordingly. Rep. of Pract. in C. B. 75. Mich. 6 Geo. 2. Fagget v. Van Thienmen.

(F. a) *Misnomer and other Defects in Venire Fac. Hab. Corpora and Distringas Rolls, amended.*

See (B) 18. 26. 32, 33, 35, 36, 37. (E) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11. and see (X) supra. Br. Return de Brief, pl. 49. cites S. C.

1. **I**N writ of entry a *juror* was returned by name of *J. Hod*, and in the habeas corpora he was named *J. Horde*, and upon him the sheriff returned nihil, and when the default was perceived, they awarded a new hab. corpora by the right name, and the sheriff was not amerced; for now no default is in him, quod nota, and therefore, as it seems, the *roll shall be amended*. Br. Amendment, pl. 37. cites 19 H. 6. 39.

2. *Process* continued against the jury till the distress, and *issues returned upon W. N.* 10s. and the writ of distress and all the rest of the process was *R. N.* and by this name he was demanded, and the under-sheriff who made the panel was examined, who said that *R. N.* was warned, and is the same person that he intended, and that his clerk had mistaken the issues, by which ex licentia curiæ the under-sheriff *amended the name and returned the issues upon R. N.* Quod nota. Br. Amendment, pl. 39. cites 22 H. 6. 35.

3. In venire facias in debt a *juror* was named *W. B.* and the habeas corpora was *J. B.* and the sheriff distrained *W. B.* and the opinion was that the process against the jury was *discontinued* and could not be amended, contrary of *miscontinuance*, note the difference. Br. Amendment, pl. 92. cites 27 H. 6. 5.

Where the sheriff returned *A.B.* [363]

in the venire facias, and in the distress *T. B.* there upon examination as above, if the very juror was summoned, and it is only the negligence of the sheriff, and that his intent was to return him, this shall be amended. Br. Amendment, pl. 51. cites 37 H. 6. 12.—Br. Return de Briefs, pl. 58. cites S. C.

A juror was *J. B.* in the panel, and *R. B.* in the habeas corpora, and upon the examination of the sheriff it was amended according to the venire facias, because it was one and the same person, and they have good authority to amend the *misprison of the sheriff* as well as of other minister. Br. Amendment, pl. 47. cites 9 E. 4. 14. per Danby.

4. In debt they were at issue, 34 were returned upon venire facias, and upon the habeas corpora and in all the other process one was omitted, by which all after the venire facias was held void, and could not be amended, and therefore a new habeas corpora was awarded upon the same venire facias, and the tales was taken also void; and notwithstanding the array of the principal was affirmed it was also void, and shall not make parcel of the record. And the plaintiff

Br. Discontinuance de Process, pl. 4. cites S. C.

prayed

prayed new tales and was denied; for it is no otherwise now but as if the venire facias had been now returned, and all, done after it, is void. Nota. Br. Amendment, pl. 10. cites 34 H. 6. 20.

Br. Return  
de Brief, pl.  
58. cites  
S. C.

5. In information; at the distress returned three of the jury who were first returned were left out, and the jury remained for default, unless those three might be demanded and sworn. And the court by advice of C. B. examined the sheriff, upon which it appeared that it was his negligence, and that they were summoned, and that his intent was to have them returned, by which the three jurors were examined if they were summoned, who said, Yes, and this by the bailiff of the hundred of C. in pain of 40s. And it was amended, for it is misprision of the sheriff's clerk, and so within the statute. Br. Amendment, pl. 51. cites 37 H. 6. 12.

Br. Return  
de Briefs,  
pl. 58.  
cites S. C.

6. Where the sheriff returns octo tales upon writ of decem tales, there upon such examination and negligence found it shall be amended, and the sheriff shall be demanded and shall have the writ again, and shall amend it, and shall bring it into court again. Br. Amendment, pl. 51. cites 37 H. 6. 12.

7. If the jurata is wrong and the habeas corpora right the judges cannot proceed to trial, but they may make the sheriff amend it, and then, &c. Per Yelverton and Hutton. Litt. Rep. 253. in case of Blackamore v. Clotworthy.

8. The plaintiff in replevin had a venire facias in Mich. term returnable in Hill. and afterwards in Hill. took an alias returnable in Pasch. and so awarded it in the roll of Mich. to the intent the trial should not come on at the assises in Kent; but the court upon the prayer of the avowant defendant, amended the roll, it being awarded in the same term, and ordered the alias returnable the same Hill. term. Goldsb. 31. pl. 3. Mich. 29 Eliz. Bosse v. Hawley.

9. If the venire facias has an ill teste, or an ill return, or is wanting, this is aided by the statute after verdict. Held per cur. Cro. E. 257. in pl. 33. Mich. 33 & 34 Eliz. B. R.

It was  
moved in  
arrest of  
judgment,  
because the  
name of the  
sheriff was

10. The panel of the jury was annexed to the venire facias but no return was endorsed thereon, or any sheriff named, but the postea mentioned the return to be by the sheriff per mandatum justic'; this is not remedied by any statute. 5 Rep. 45. Mich. 35 & 36 Eliz. B. R. Rowland's case.

not endorsed on the distringas; per tot. cur. it was held not amendable, and not aided by any statute. Cro. J. 188. Mich. 5 Jac. B. R. Holdsworth v. Sir Stephen Proctor.

[ 364 ] But where the distringas was blank, and no return or name of the sheriff thereto, but the venire facias was well returned and had the name of the sheriff thereto, the court held it amendable; and so held that it differed from Rowland's case; for there the sheriff's name was wanting upon the venire facias, which guides the rest of the process. Cro. J. 443. pl. 18. Mich. 15 Jac. B. R. Churcher v. Wright.—S. P. Cro. J. 528. in pl. 5. per cur.

11. Upon awarding a venire facias upon the roll, the day of the return was omitted on the roll. This was assigned for error, sed non allocatur after verdict. Mo. 710. pl. 993. Mich. 38 & 39 Eliz. Dickenfon v. Shere.

Upon the  
venire fa-  
cias there  
were but 23  
jurors 15-

12. Error assigned was that there were but 23 of the jurors names returned upon the panel, and that the trial was by 10 of them and 2 tales men; but because this default was in the return of the jurors names upon the hab. corp. and not upon the ven. fac. in which writ were

were 24 names it was ordered to be amended. Cro. Eliz. 586. *turned, and the trial was by 10 of the principal panel, and 2 of the tales*; upon conference with all the judges of both Serjeants-Inns, the greater part of them conceived this to be only a misreturn of the sheriff, and so aided by the statute 18 Eliz. 14. and adjudged accordingly. Cro. C. 223. pl. 11. Trin. 7 Car. 1. B. R. Sankill v. Stocker.—Jo. 245. pl. 4. S. C. and there is no difference in tales; for it is the default of the sheriff, and a verdict by 12; by 3 justices, Crooke e contra; and judgment accordingly.

13. In *ejectment* it was moved in arrest of judgment that the ven. fa. was *ad faciend' jurat' in placito transgressionis*, whereas it should be *in placito transgressionis & ejecttionis firmæ*; the court held this not amendable; for non constat, but that there may be an action of trespass depending, and that this ven. fac. is awarded thereupon; and though it was said that ejectment is only a plea of trespass in its nature yet the actions are several, and therefore the ven. fac. ought to be accordingly. Cro. E. 622. pl. 14. Mich. 40 & 41 Eliz. B. R. Clerk v. Clerk. G. Hist. of C. B. 132. mentions S. P. and seems to intend S. C.

14. In debt the *venire facias* was awarded bearing *teste after the judgment*, (it being dated a year after;) but held that it being after verdict, and the trial is upon the distringas with the nisi prius, so as if no venire at all had been, the statute would have helped it, and it shall not be intended that this was the venire in this suit; nor would the court take it to be the venire in this suit, though certified to be so, but rather that there was no venire at all, [and then] the trial and judgment thereupon are good. But they held that the teste of a venire facias can never be amended, but the return thereof may, because the roll warrants it, and this being variant from the roll may be amended; but the rolls make no mention of the teste, as 2 Ma. D. 121. so the judgment was affirmed. Cro. E. 820. pl. 15. Pasch. 43 Eliz. B. R. Carew v. Mercer. S. C. cited by Powell J. 2 Ld. Raym. Rep. 1066. and said it was the negligence of the clerk to make the teste of another day than the award of the court was; for he ought to know that

the writ should be tested when the court awards it; but says that the later books have gone contrary to this case of Crooke, where the writ was an ill writ, As if tested out of term.

15. After verdict exception was taken that the *appearance and issue were in Hillary term* 1 Jac. and the *venire facias* to try the issue was dated Jan. 23. which was before the appearance and the issue; but the roll was right. The court held it was amendable; for the ven. facias shall be amended by the roll, which is the warrant for it, and shall be made subsequent to the issue. Cro. J. 64. pl. 3. Pasch. 2 Jac. B. R. Dolphin v. Clark. Venire facias bore teste before the appearance of the defendant in court, and it was ruled to be naught. Cited Noy

58. as the case of Moulton v. Hall.—Mo. 465. pl. 657. cites S. C. adjudged that it is error not remedied by the statute.

It was assigned for error in ejectment that the issue was joined Trin. 2 Car. and the ven. fa. bears date 4 die Maii, which was before the issue joined, and upon a certiorari upon diminution alleged, it was certified that the venire and distringas were of the date of 4 May, which was after Easter-term. Sed non allocatur; for it is but mis-fuing of the process at the most, and the court shall intend there was another venire facias, according to the roll of awarding the venire facias, and the misdating of it can cause no stop of the judgment, wherefore the trial is good, and judgment was affirmed. Cro. C. 90. pl. 13. Mich. 3 Car. in Cam. Scacc. Moor v. Hodges.—The case of Hodges v. Moor is in several books; and though by the time it seems to be S. C. yet S. P. does not appear in any of them. [ 365 ]

16. A distringas was awarded a long time after the trial, yet the roll being good, it was amended. Cited by Tanfield J. Cro. J. 162. in pl. 16.

17. The



The *jurata* was *apud castrum Oxon. in civitate predicta*, and the *habes corpora* was *apud Guildhall*, &c.

17. The *ven. facias* was *de vicineto de Hartford*, where it should have been *de castro de Hartford*. It was held by all the judges and barons to be ill; for *Castrum Hartford* is a *distinct name of a place*, as *Manerium de D.* and so, as it was said, are all the precedents where things are alleged to be done *apud Castrum Ebor. apud Castrum Norwic.* there the *venues* are *de castro*. Cro. J. 239. Pasch. 8 Jac. Cuninghame v. Hare.

And Yelverton and Hutton held the trial void; for the judge that shall sit at the castle had no warrant to take this trial; and so *coram non iudice*, and they held it not amendable now after trial. Litt. Rep. 253. Pasch. 5 Car. C. B. Blackmore v. Ciotworthy.

Cro. J. 216. pl. 19. Denbawgh v. Woodley, S. C. & S. P. held accordingly. — Though the statute 35 H. 8. cap. 6.

18. In trespass upon the general issue pleaded, *one only of the jurors of the principal panel appeared at the assises*, and upon the prayer of the plaintiff a *tales* was awarded, and the sheriff returned a panel thus, viz. *Nomina decem talium*, and under it he returned the names of 11 jurors. It was resolved that this was only a misprision of the sheriff, and should be amended by putting out the word (*decem*) and then the title would be good and formal. 10 Rep. 102. Mich. 10 Jac. Denbawd's case.

which gives the *tales*, mentions the adding it to those, (viz. in the plural number,) yet by the equity of that statute it shall be granted for one. The statute is for the advancement of justice. Jenk. 288. pl. 24. S. C.

Brownl. 233. Hill. 12 Jac. Banks v. Barker, S. C. and held not amendable.

19. In trespass of taking goods in W. the defendant justified by the custom of the manor of T. and the *venire facias* was awarded *De vicineto de W. & manerio de T.* but the sheriff returned his panel *De vicineto de W.* only. This was denied to be amended, though it was moved that the award by the roll was *De vicineto de W.* and the manor both, and that the *venire facias* might be amended by the roll; for the venue should not be from W. at all, the taking being confessed on both sides, and so required no trial; but the thing in dispute was the custom only, and though the roll had been right *de manerio* only, so that the *venire facias* might be amended by it, yet when it appears that the trial was not had by such a jury as the roll and the law required, the *venire facias* shall not be amended. Hob. 77. pl. 97. Banks v. Parker.

Hutt. 53. S. C. but S. P. does not appear. — Win. 58. Bulloigne v. Gervis, S. C. but S. P. does not appear.

20. *Venire facias* was made in this form, (viz.) *Liberos & Legales homines de B.* and it should have been *de vicineto de B.* and it was notwithstanding held good, and amendable by the roll; for it shall be intended that the jurors are inhabiting in the town of B. although the sheriff returns the jurors of other places, and none of them are named of B. and the *ven. facias* was returned by A. B. Ar. without naming him *Vic.* and it was amended by the court. Brownl. 43. Bullen v. Jervis.

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21. The court refused to amend a *venire facias* which was *album breve*, though the sheriff's name was to the panel; but if the sheriff upon the *venire facias* had returned that the execution of that writ did appear in a certain panel annexed, &c. and had not put his name to the writ of *ven. facias*, but to the panel, it should have been amended. Brownl. 43. Trin. 15 Jac. Anon.

In debt the issue was

22. Bill was filed *die Mercurii prox' post octab. Pur'*, which was the



the 12th of Feb. and the *venire facias* bore date 10 Feb. which was two days before the filing the bill, and so before any issue could be joined. This was assigned for error; but all the justices and barons held, that this is as if there had been no *venire facias*; for it cannot be intended a *ven. facias* in this action, which was not then commenced, and is contrary to the roll, which mentions it to be awarded after issue joined; and though in the action (which being joined the same term, and by the same roll) the award was of a *venire facias* returnable also die Mercurii post octab, Purificat. (which was the day that the bill was filed and he pleaded) yet it was held good enough, and the judgment affirmed. Cro. J. 458. pl. 4. Hill, 15 Jac. in Cam. Scacc. *Marshall v. Bulwer*, by the stat. 18 Eliz. 14. as if there had been no such writ, because it was impossible that this should be the writ in that action. Allen 20. Trin. 23 Car. B. R. *Brown v. Evering*. — Cro. C. 90. pl. 13. *More v. Hodges*, in the Exchequer-chamber, Mich. 3 Car. S. P.

joined Pasch. 21 Car. and the *venire facias* certified to be in placito præd. &c. was tested Pasch. 20 Car. And this being assigned for error, it was adjudged that it was helped

23. Where the *venire facias* is good, and well returned, a fault in the *distringas* shall be amended by it, by the sheriff. Agreed per tot. cur. 2 Roll. Rep. 111. Trin. 17 Jac. B. R. Anon. And Browne said that so it had been adjudged before in Wright's case.

In the *venire facias* one of the jury is called *Gargenter*, and

in the *distringas* *Carpenter*, and it was stayed for this fault. Sty. 374. Trin. 1653. in *Kitchinman's* case.

In debt it was moved in arrest of judgment, that the *distringas* was with a blank, and the word (*Debiti*) omitted, so it was *distringas* in another cause; but held per cur. that this was as no *distringas* at all, and so aided by the verdict, and amendable; but an ill *distringas* is not. 2 Salk. 454. pl. 1. Pasch. 4 Ann. B. R. *Bullock v. Parsons*. — 2 Ld. Raym. Rep. 1143. S. C. and the whole court held the *distringas* amendable, and gave judgment for the plaintiff.

24. In ejectment against two defendants, they both pleaded Not Guilty. The award upon the roll was against both. The hab. corp. was against both, but the *ven. fa.* against one of them only. The plaintiff had a verdict against both. The court held it amendable, and to be made agreeable with the plea-roll, which was inter partes prædictas, and the omission here is only *vitium clerici*. 3 Bulst. 311. Mich. 1 Car. B. R. *Cranfield v. Turner & Collins*.

25. In the *ven. facias* there were but 23 jurors returned, and in the hab. corp. there were 24, (viz.) the 23 returned on the *ven. fa.* and one W. L. who was sworn with 11 of the others, and the issue was tried by them. The court delivered their opinions seriatim, that this was a manifest error, and not aided by any of the statutes, nor can it be aided by examination of the sheriff, and so reversed the judgment in C. B. Cro. C. 278. pl. 18. Mich. 8 Car. B. R. *Fines v. Norton*,

Jo. 301. pl. 6. *Fines v. North*, S. C. accordingly. — G. Hist. of C. B. 131. S. C. — But where 23 only were re-

turned, whereof 12 appeared and gave their verdict, it was resolved upon great deliberation, that it was remedied by the 18 Eliz. cap. 14. 5 Rep. 37. 2. Pasch. 31 Eliz. B. R. *Gardiner's* case.

26. Upon a motion in arrest of judgment it was insisted, that the day on which the assizes were to be held, and the place where, were left out of the *distringas*, and so a mis-trial. Sed per curiam, if there had been no *distringas* the trial had been good, because the warrant to try the cause is the *jurata*, and that being right the *distringas* shall

S. C. cited Comyns's Rep. 283. and says it is usual in such cases to amend

writs by the roll. — *shall be amended by it.* 3 Mod. 78. Pasch. 1 Jac. 2. B. R. Jackson v. Warren.  
 Gilb. Hist. of C. B. 133. S. P. and seems to intend S. C.

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29. If there be *such a fault in the venire as makes it a perfect nullity, so that it has no relation to the cause*, yet if there be a good *distringas*, that being one of the jury processes, the omission of the former is cured; for the omission of any judicial writ is aided by the statute, and a venire, that is a nullity, and has no relation to the cause, is as if there had not been any, and so of a *distringas* where there is a proper venire. G. Hist. of C. B. 134.

30. *London was in the margin, but in the body of the declaration the venue was laid at Tame in Oxfordshire*, and tried there, and obtained a verdict; defendant moved in arrest of judgment, for that the venire facias being awarded to the sheriffs in the plural number must signify the sheriffs of London, and the court must take judicial notice that there is but one sheriff of Oxfordshire. Per cur. had there been no *proper venue in the body* of the declaration the margin must have been resorted to, but in this case *the margin must be rejected*; the word (sheriffs) for (sheriff) is amendable, and here the ven. fac. is returned by the sheriff of Oxfordshire. Barnes's Notes in C. B. 343. Trin. 11 & 12 Geo. 2. Sheers v. Bartlett.

31. It is *constant practice to leave a blank in the record of the nisi prius for the return of the ven. fac.* and the award of the ven. fac. is no part of the issue, and is amendable by the ven. fac. itself. Barnes's Notes in C. B. 345, 346. Pasch. 12 Geo. 2. Bryan v. Smith.

As to variance see  
 (Y)

(G. a) Misnomer, and other Defaults in Records of Nisi Prius, Postestas, and other Records, amended.

Br. Amendment, pl. 21. S. P. and cites S. C. —  
 Br. Vaine, pl. 15. cites S. C. —  
 Br. Error, pl. 68. cites 7 H. 6. 28. S. C. —  
 Br. Amendment, pl. 32. cites 7 H. 6. 29. S. C.

1. **I**N trespass they were *at issue upon villeinage regardant to a manor in a foreign county, and pais awarded of the foreign county by assent of parties*, and because the words (*ex assensu partium*) were not entered in the record, it was amended in another term; quod nota. Br. Record, pl. 11. cites 44 E. 3. 6.

2. *All the term in which judgment is given, or roll made, the record is in breast of the justices, and they may change it if it be entered contrary to truth*, or if tales be awarded and marked upon the scrowle, and not entered in the roll, or false Latin, &c. they may amend it the same term, contra in another term; for then the roll is the record. Note the diversity. Br. Record, pl. 20. cites 7 H. 6. 30.

3. *Where damages in the record are 100 l. and the nisi prius and the verdict is 10 l. yet the plaintiff shall recover; for this does not change the issue.* Br. Amendment, pl. 113. cites 10 H. 7. 25.

4. Where

4. Where *essoign* is cast after *issue unde judicium*, where it should be *unde jurata*, or *e contra*, this shall be amended; for *that which is of record* shall be amended. Br. Amendment, pl. 113. cites 10 H. 7. 25.

5. Where the *record* is entered otherwise than the papers are, there by examination of the clerk, and view of the papers, it may be amended. Br. Amendment, pl. 113. cites 10 H. 7. 25.

6. In assumpsit it was found for the plaintiff, but in the *postea* the verdict was *not certified that the jury found that the plaintiff sustained damage by reason of the non-performance of the promise in the payment of the money*, for which the plaintiff had judgment, but the court ordered the *postea* to be amended, and affirmed the judgment. Mo. 689. pl. 952. Pasch. 36 Eliz. Sackford v. Phillips. Cro. E. 455. pl. 3. Phillips v. Sackford S. C. but S. P. does not appear.—Ow. 109. S. C. but

S. P. does not appear.

7. Error to reverse a judgment, for that the writ of enquiry was directed to the sheriffs of London *quod inquirat*, when it should be *quod inquirant*. It was ordered by the court to be amended, for it was but the default of the clerk. Cro. Eliz. 657. Trin. 41 Eliz. B. R. Lewson v. Rudleston.

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8. The plaintiff declared for a *trespass done* 12 Jan. 45 Eliz. and the record of *nisi prius* was of a *treipass* 12 Jan. 25 Eliz. The verdict found the defendant guilty, prout. At the day in bank the plaintiff prayed amendment of the record of *nisi prius*, but the court held it not amendable. Mo. 681. pl. 935. Anon.

9. In ejectment the *distringas* was between Richard Fowkes and John Child, but the *panel* annexed between Richard Fowkes and William Child; the truth was, there were two records of *nisi prius*, the one between Richard Fowkes and William Child, and the other between Richard Fowkes and John Child, and the *sheriff* by mistake annexed the *panel* between R. Fowkes and William Child, to the *distringas* between R. F. and John Child; but resolved that it was aided by the statute of jeofails, and was as if there had been no writ at all. Cro. J. 396. pl. 1. Pasch. 14 Jac. Fowks v. Child.

Roll. Rep. 374. pl. 30. S. C. and Doderidge said that it could not be amended, but the question was, if the trial was not good without any amend-

ment, and after at another day it was ruled not to be any writ in judgment of law, and aided by the statute of jeofails.—3 Bull. 179. S. C. and ruled accordingly by 3 J. but Haughton J. differed in opinion, that the trial was not good.

10. The declaration omitted to allege *the very day on which the robbery was done*, for he shewed, that it was committed in October, when in truth it was in September. It was moved, that the *record* which was taken out for trial, but not given in [to the clerk of assise] might be amended; because the notice given to the hundred, as the record is, would appear to be before the robbery; and the court ordered it to be amended. Brownl. 156. Trin. 15 Jac. Camblyn v. Tending (hundred).

11. When a record is removed into the Exchequer-chamber, if there is a fault in the transcript by the negligence of the clerk, the course is to send for the clerk of the court, and amend it in the Exchequer-chamber; but if the principal record which remains in court

court be false, then to amend it, and thereupon to allege diminution, and upon certificate thereof, the transcript shall be also amended, if it appears to be only the negligence of the clerk. Cro. J. 429. pl. 4. in a nota there; Trin. 15 Jac. 1. B. R.

12. Trespass. In the postea there was *no association to the justice of assise expressed*, as was objected there ought to be; but Roll Ch. J. said, that this is the fault of the clerk of the assise, and therefore ordered him to attend and shew cause why the postea should not be amended. Sty. 191. Hill. 1649. Poynes v. Francis.

In B. R. declaration was on a bail bond, the memorandum was of Trin. term,

15. Writ of error to reverse a judgment upon a mutuatus, for that the *memorandum* was *die veneris, &c.* which was *before the debt became due*. It was moved for leave to amend the memorandum, and to make it another day, that it might agree with the judgment; but per cur. it was denied. 4 Mod. 367. Mich. 6 W. & M. in B. R. Rush v. Tory.

and the assignment was not till November following; and it was objected, that the plaintiff of his own shewing had no cause of action at the time of the action brought: the plaintiff prayed to amend, and it was objected that there was nothing to amend by; but the court gave them leave to file a new bill as of Mich. term, which is instead of the original writ, and to amend the memorandum by that bill. G. Hist. of C. B. 93.

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16. Indebitatus *assumpsit* was brought *against the executor upon the assumpsit of the testator*. The *plea-roll* was, that the *testator non assumpsit*; but the *postea* was, that the *defendant non assumpsit* generally, and verdict for the plaintiff, and moved that the *postea* might be amended, and it was granted; for per cur. the jury have found the defendant guilty, as the plaintiff has declared, which is upon a promise of the testator, the plea-roll being right; but if the defendant had pleaded *Quod ipse non assumpsit*, a repleader ought to have been granted. Ld. Raym. Rep. 133, 134. Mich. 8 W. 3. Walker v. Brooke.

15. Error of judgment in an inferior court, the plaintiff had a verdict and 3*l.* damages, 1*s.* costs, and 5*l.* 10*s.* *de incremento*, and judgment that he recover the *aforsaid sums attingen' ad 7*l.* &c.* The court said they would not suffer them to amend any *error in knowledge* or skill by their minute-book, but only *errors in fact* in the record by the minute-book, if it appears upon examination to have been originally right in the book, and not made for this purpose. 6 Mod. 165. Pasch. 3 Ann. B. R. Gawdy v. Pickersdale.

16. Debt for money lent at a play called, All-fours. The defendant pleaded *Nil debet*. The plaintiff in the record of *nisi prius* omitted the words, *Et præd' quer' scilicet [similiter.]* After verdict for the plaintiff judgment was arrested, and now the plaintiff moved that the record of *nisi prius* should be amended by the original record, and the court granted it, for the omission was only the misprision of the clerk. Comyns's Rep. 376. pl. 187. Mich. 10 Geo. 1. C. B. Walker v. Lester.

17. On a motion to amend the record of an *issue of Nul tiel record by the writ of scire facias*, all the court, after much debate, were of opinion that it might be done, and ordered the amendment accordingly. Rep. of Pract. in C. B. 76. Mich. 6 Geo. 2. Hamfon v. Chamberlain.

18. The

18. The writ of *habeas corpora jurator* being wrong in the day of *nisi prius*, had been ordered to be amended; and it was moved to amend the jurata in the record of *nisi prius*. The court, after consideration, were of opinion that as the writ was amendable by the stat. \* 5 Geo. cap. 13. and was amended, and the day of *nisi prius* thereby rightly appointed, the jurata, which is not an award of the court, but only to annex the proceedings, and which is wrong by misprision of the clerk, ought to be amended and made agreeable to the writ; and ordered accordingly. Barnes's Notes of C. B. 8. Trin. 7 & 8 Geo. 2. Waldo v. Harison.

\* See (R) supra.

19. Amendment of a record by striking out the entry of a view was denied, and the court said such alteration could not be made, unless by some entry to amend it by. Rep. of Pract. in C. B. 131. Trin. 10 Geo. 2. Cartwright v. Gardiner.

## (H. a) Misnomer and other Defects in Verdicts, amended.

1. **I**N ejectment, the case was *J. W. bishop of G. being seised of, &c. demised the same to the plaintiff, reciting the confirmation of the dean and chapter, but that was of a lease made by R. W. The jury did not find that the dean and chapter did confirm any lease made by J. W. but they found expressly that J. W. made a lease of, &c. to the plaintiff, who now moved that the confirmation of the dean and chapter of a lease made by R. W. might be amended, and made J. W. and that the note given to the clerk of the assises was, that they intended to find the confirmation expressly, and of a lease made by J. W. But the court held clearly that after verdict returned to the court, it cannot be amended by any such suggestion; for then all verdicts may be prayed to be amended; and judgment for the plaintiff. Cro. E. 111. pl. 8. Mich. 30 & 31 Eliz. B. R. Mornington v. Trye.*

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2. After judgment in assault and battery, it was assigned for error, that after the words, *Per sacramentum proborum & legalium (hominum)* was left out. Per Coke Ch. J. this is well amendable, it being in a judicial process. 3 Bulst. 208. Trin. 14 Jac. Pipe v. Alger.

3. In debt for rent, the plaintiff declared on a lease of copyhold lands, &c. rendering 38l. per ann. and upon a lease of freehold lands rendering 20s. per ann. rent by equal portions at Michaelmas and Lady-day, and for 19l. for half a year of the copyhold and 10s. of the freehold the action was brought. Upon Nil debet pleaded, the jury found for the plaintiff, quoad the 10s. for the freehold; and for the defendant, quoad the 19l. for the copyhold. The postea was returned, that it was found for the plaintiff, quoad 10s. parcel of the said 19l. 10s. and quoad the 19l. residue of the said 19l. 10s. that the defendant non debet. It was moved, that the verdict was uncertain which of the rents was unpaid; but the judge, before whom

If the jury find a certain verdict, and it is entered uncertainly on the record, if the judge, who tried the cause, remembers certainly how the jury found it, it

the



shall be as-  
certained  
by the me-  
mory of the  
judge and  
the verdict  
be made

certain as the jury found it. G. Hist. of C. B. 140.

*the issue was tried, remembering that the jury had found for the copy-  
hold rent for the defendant, and for the freehold rent for the plaintiff,  
by the rule of court the return of the postea was amended ac-  
cordingly. Cro. C. 338. pl. 25. Mich. 9 Car. B. R. Elliot v.  
Skipp.*

4. Case, &c. for words, in which the plaintiff laid a colloquium between the defendant and one T. S. concerning the plaintiff. The jury found the defendant guilty of speaking the words, *Modo & Forma, as the plaintiff had declared*, but [as it seemed by the entry] did not find that J. S. spoke the words precedent, and, without reference to these words, what the jury had found was insensible; afterwards it appeared to the court that those precedent words were found by the jury, and that it was the misprision of the clerk of the assise in not entering them; and it was ordered that the words be inserted upon payment of costs to the defendant. 2 Jones 211. Trin. 34 Car. 2. B. R. Nailer v. Clerke.

Ld. Raym.  
Rep. 138.  
S. C. and  
ibid. 141.  
S. P. by  
Holt Ch. J.  
that a spe-

5. Adjudged that a *general or special verdict may be amended by the notes of the clerk of assise in civil but not in criminal actions*; a special verdict may be also amended by the *notes of the counsel in the cause*, after error brought. 1 Salk. 47. pl. 4. Hill. 8 & 9 W. 3. B. R. the King v. Keat.

cial verdict cannot be amended by the notes in felony, as it might in civil cases.—The special verdict may be amended according to the minute or note, because the *minute* is the instructions taken at the assises for the entering it up; but *nothing can be added to the minute, though never so strongly proved by the evidence*, because that would be to subject the jury to an attainr for a fact that was never found by them; which is contrary to justice to do. G. Hist. of C. B. 139, 140.

A special verdict may be *amended* by notes taken by the clerk at the trial, or on proof of the certainty of what was then given in evidence, and ruled accordingly on payment of costs. 8 Mod. 49. Trin. 7 Geo. 1. 1722. Mayhoe v. Archer.

It was moved for a rule upon the *associate* to give them a copy of the minutes of a special verdict. But the court said, the judge that tried the cause is to settle the special verdict, and therefore the proper way of proceeding would be to take out a *summons to order the associate to attend before the judge*; and if he does not attend upon it, then the application will be necessary to be made to the court. So rejected the motion. 1 Barnard. Rep. in B. R. 191. Trin. 2 Geo. 2.—v. Revel.

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6. In *trover* against 15 defendants, and counts that the goods came to the hands of all, but when he comes to the conversion he omits the name of one of them. All the 15 plead by name, and evidence given against all; and judgment for the plaintiff. The court held this omission only *vitium clerici*. It was objected that the jury could not find the 15th man guilty, but only as the plaintiff had charged him, and that was with *trover* only; but *per cur.* it cannot be intended that the jury would find him guilty of nothing; for finding goods without converting them is no crime; and amendment was ordered on payment of costs. Ld. Raym. Rep. 116. Mich. 8 W. 3. Smith v. Fuller & al'.

7. Information was in the Exchequer for selling lace and silk, &c. The jury found the defendant guilty as to the lace, but said nothing as to the silk. Upon error brought this omission was assigned, whereupon a motion was made in the Exchequer for leave to amend, but it was denied as not being amendable, and so judgment reversed



in the Exchequer-chamber. Ld. Raym. Rep. 324. Hill. 9 W. 3. Miller v. Tretts.

8. At nisi prius before the lord Ch. J. a verdict was taken by mistake of the associate for the defendant Jones instead of finding him \* Not guilty. As to the other defendant, a verdict was found for the plaintiff, and damages 200l. Plaintiff moved that the return of the postea as to Jones, might be amended, which was ordered on hearing counsel on both sides. The return of the postea is the act of the Ch. J. and must be made as it ought to be; it was urged by defendants counsel, that the verdict, as to the other defendant, was contrary to evidence; but be that so or not, the *verdict* being *right in part cannot be set aside*. Barnes's Notes of C. B. 9. Pasch. 8 Geo. 2. Williams v. Jones and another.

\* So it is in the orig. but seems misprinted, and that it should be (Guilty) and the (Not) omitted.

(I. a) Mistakes in or relating to Judgments, amended at Common Law, or Now.

1. *Præmunire* in B. R. the judgment was entered in the last term, and the justices did not remember it, and it was *entered in the roll of the filixer* where it ought to be in the roll of the prothonotary. And it was said that they cannot amend their own default in judgment in another term; but if it had been in process they might have amended it. Br. Amendment, pl. 46. cites 9 E. 4. 3.

2. Record of writ of dower was certified out of C. B. into B. R. by writ of error, because it said that the baron was not seised die sponsalium & unquam inde postea; and by examination of the clerk of C. B. it appeared that the record there was *Nec unquam inde postea*, and therefore it was awarded in B. R. by the statute. Br. Amendment, pl. 79. cites 22 E. 4. 46.

3. Error on a judgment, because it was *Quod recuperet versus* E. S. and did not say *prædict. E. S.* All the justices agreed that this was amendable. Golds. 89. Pasch. 30 El. The Lord Seymour v. Sir John Clifton.

Cro. E. 97. pl. 14. S. C. says the error assigned was, because the

issue was joined that J. C. hoc petit quod inquiratur per patriam, & E. S. similiter, but said not (*prædictus*;) but no other E. being named in the record, and so cannot be intended another person, and the word (*prædict*) being form and not substance, it is aided, and was amended, and judgment affirmed.

4. No statute gives amendment in *defeasance of judgments or verdicts*, but only in affirmance of them; per cur. Le. 134. pl. 184. Hill. 30 Eliz. C. B.

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8 Rep. 158. b. S. P.—

Gilb. Hist. of C. B. 140. S. P.

5. A repleader was awarded, and the award entered thus, viz. *Et quia placitum illud in modo & forma placitat. est sufficiens in lege*, instead of (*minus*) *sufficiens*, &c. The court awarded that the parties should replead. Per cur. This cannot be amended by the Paper-Books after judgment for the plaintiff upon repleading, because

G. Hist. of C. B. 145. cites S. C.

cause the fault is in the judgment itself, which is the act of the court. Glanville said it is no error in the judgment, but the error is in the judgment [inducement] to the judgment, and may be well amended, and of the same opinion was Popham. Ow. 19. Hill. 36 Eliz. B. R. Walter's case.

6. If the judgment be entered *that the defendant sit in misericordia*, where it should be *Quod querens*, it is not amendable. Mo. 366. pl. 501. Mich. 36 & 37 Eliz. in Welcombe's case.

Cro. E. 497.  
pl. 17.

Harcourt  
v. Bishop,  
S. C. men-  
tions it to  
be per  
jurat. in-

stead of per curiam, and held not amendable, and judgment reversed.

7. Error upon a judgment, which was *that the now defendant recover 20l. assessed to him per jur. and also 10l. assessed to him bic per jur.* where it should have been *per cur.* The court would not allow it to be amended, being parcel of the judgment of the court, which never was amended. Goldsb. 151. pl. 78. Hill. 43 El. Harcourt's case.

Cro. E. 434.  
pl. 44. S. C.

and held a  
manifest  
error.—

Sty. 477.

Devereux  
v. Jackson,  
S. P.

8. In error on a judgment the error assigned was, *that the original writ was 20l. and all the mesne process was so likewise*, but when the defendant appeared at the exigent, the entry was *Quod defendens obtulit se in placito debiti of 10l.* where it ought to be 20l. but it was not amended, because it appeared on view of the record that *no original was certified.* Goldsb. 133. pl. 32. Hill. 43 Eliz. Staughton v. Newcombe.

Bulst. 107.

S. C. ac-  
cordingly.

9. It was assigned for error of a judgment in debt, that the entry of the *bail was sub pœna executionis in adjudicatione executionis*, so that it was entered for the execution only, and not for the judgment, whereas it ought to have been *sub pœna condemnationis.* Per cur. The bail being once taken, stands as well for the judgment as the execution, and ordered it to be amended, and made *sub pœna executionis judicii* as well as for the execution. Cro. J. 272. pl. 5. Hill. 8 Jac. B. R. Hampton v. Courtney.

10. In debt upon an obligation the defendant, after issue of *dureffe*, at the nisi prius, *relicta verificatione dicit quod ipse non potest dicere actionem nec quin ipse fuit sui juris, & scriptum prædictum fuit voluntarium.* Judgment was entered thereupon, and the error assigned was, that it was entered *Quod non potest (dicere) actionem*, instead of (*dedicere*). Per cur. This made all the sentence vitious and insensible, and was not amendable, and of that opinion were the whole court. Cro. J. 343. pl. 10. Pasch. 12 Jac. 1. Anon.

Hob. 327.

Pasch. 18

Jac. S. C.

that it was

amended,

though it

was object-

ed that the

judgment

was not

given by

this court,

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but by the

justices of

11. In a *quare impedit* to present to a vicarage the plaintiff had a verdict, and a writ was awarded to the bishop; but upon error brought, it was assigned that the judgment was entered, (*viz.*) *Quod prædict' (the plaintiff) recuperet, &c. præsentationem suam ad ecclesiam præd.* when it ought to be *Ad vicariam ecclesiæ.* But the court resolved, and awarded that it be amended, because the verdict is general, and they found for the plaintiff, and the judgment ought to agree with the verdict; and it was only the misprision of the clerk; for the record precedent in every part, and in the issue and verdict, it is *Vicariam ecclesiæ*: and by 8 H. 6. cap. 15. it is amendable, though it be in the judgment, it being the misprision of the clerk. Hutt. 41. Mich. 18 Jac. Sherley v. Underhill.

S. C. cited Cro. J. 633. Hill. 19 Jac. B. R. in case of Mason v. Fox, & al.

—S. C.

—S. C. cited Palm. 199. Trin. 19 Jac. in case of Chapleyn v. Alleyn.—S. C. cited Litt. Rep. 50. That it was *Ad ecclesiam vicariæ*, and amended; and in the principal case there of a disturbance to present to a vicarage, the original was *Quare non præsentaret ad ecclesiam*, and adjudged that it could not be amended, if instructions to the curfitor were *Ad ecclesiam*; for that shall always be intended of the parsonage, and ought to be *Ad vicariam*. Trin. 3 Car. C. B. in the case of *Quare impedit*.

12. In debt upon the 2 E. 6. for tithes, the plaintiff was non-suited, and in the judgment these words, viz. *Quod eat inde sine die*, were omitted, and yet it was amended. Raym. 39. Arg. cites Mich. 4 Car. B. R. Everard v. Bosvile.

Sid. 70. pl. 8. Arg. cites S. C.—  
In replevin the defendant avowed.

ed, and the plaintiff pleaded an ill plea in bar, and in the judgment these words, *Ideo consideratum est quod prædict. the plaintiff nil capiat per breve suum, sed sit in misericordia pro falso clamore suo, et prædict. the defendant eat inde sine die*, were totally omitted, yet the record was amended by inserting these words, and thereupon judgment was affirmed absolutely. 2 Saund. 289. Hill. 22 & 23 Car. 2. Poole v. Longvill & al'.—G. Hist. of C. B. 144. cites S. C. says this omission shall be amended, because there is no judgment returned on the record sent in answer to the writ of error; and then the writ of error itself is not answered, unless the judgment be sent with the roll; for the writ of error is *Judic' inde reddit' sit*, unless the judgment be transcribed upon the roll in error. The plaintiff in error must be nonsuit, and therefore it is for the advantage of the plaintiff in error, as well as for the defendant, in whose behalf the judgment passed below, that this judgment should be transcribed upon the record; because if there be no judgment, the plaintiff in error cannot be hurt by such non-entry, nor has he whereof to complain, and therefore for both their advantages the judgment ought to be entered on record. G. Hist. of C. B. 144.

13. Error of a judgment. The record certified the defendant in *misericordia*, which was assigned for error, because the defendant being an infant, and appearing by guardian, ought not to be amerced. It was amended in C. B. and made *Nihil in Misericordia quia infans*, and was so certified into B. R. that it might there be amended, which the court agreed to, because they would not intend that the judgment was *misentered at first, but misrecited*. Cro. C. 410. pl. 5. Trin. 11 Car. Smith v. Smith.

14. Debt upon obligation of 100l. That if H. H. or R. H. the defendant, paid 51l. 6s. 8d. to J. N. such a day, it should be void. The defendant pleaded *Solvit ad diem*, and found against him, and judgment, *Quod quer' recuperet debitum & damna, &c. against R. & prædict. H. in misericordia*, whereas it should have been *& prædict. R. in misericordia*, H. being no party to the record. Per tot. cur. This entry is but the misprision of the clerk, and shall be amended, and the judgment affirmed. Cro. C. 594. pl. 8. Mich. 16 Car. B. R. Pelham v. Hemmings.

15. Judgment was entered *Quod quer' & plegii sui sint in misericordia*. It was moved that it might be amended by striking out *plegii sui*, because they ought not to be amerced. The court took time to consider of it. Raym. 42. Mich. 13 Car. 2. B. R. Delabar v. Yardley.

Keb. 125. pl. 40. S. C. The court conceived that this is part of the judgment,

and not surplage, and that the pledges be amerced; but adjournatur. And Ibid. 155. pl. 97. S. C. adjournatur, to search precedents.

16. In debt on bond, after a verdict for the plaintiff, the judgment was entered *Quod recuperet the sum, pro misis & custag.* instead of *Pro debito præd.* But this was ordered to be amended, as the default of the clerk, though in another term, the court having power over their own entries and judgments. Vent. 132. Trin. 23 Car. 2. B. R. Anon.

17. Judgment was given for 2 *plaintiffs*, but the entry was *Quod recuperet* in the singular number, and this was assigned for error; sed non allocatur; for this is only the misprision of the clerk, and shall be amended. 2 Jo. 199. Pasch. 34 Car. 2. B. R. Devoren v. Walcott.

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Carth. 95.  
S. C. but  
S. P. does  
not appear.  
— Ibid.

18. Judgment was entered with a *misericordia* instead of a *capiatur*, sed per curiam, this is now remedied by the statute 16 & 17 Car. 2. cap. 8. which enacts, that judgment shall not be stayed after a verdict for want of *misericordia* or *capiatur*. 4 Mod. 6. 2 W. & M. B. R. Chettle v. Lees.

167. S. C. & S. P. and says, that 2 rules were produced one between LINCEN AND LUCY, when Pemberton was Ch. J. where the judgment was amended in this point, viz. by the entry of a *misericordia* instead of a *capiatur*, and the other rule was between COKE AND GRIMES, where *misericordia* was struck out, and a *capiatur* inserted by the direction of the court, but in the principal case the court would make no rule to amend.

If there be a *mistake* or error in the judgment, in any such matter in which the clerk has no instructions, as if a *capiatur* be entered for a *misericordia* or *e converso*, this was error in the judgment, because before 16 & 17 Car. 2. it made fine to the king, and a difference in the execution, and there was no instruction in the record itself in the judgment book whereby to amend it, & non constat, whether it was the error of the clerk in entering, or of the court in giving judgment. G. Hist. of C. B. 142.

Cumb. 397.  
S. C. but  
S. P. does  
not appear.

19. A *sci. fa.* against bail was several, but judgment was given for the plaintiff to have execution *de prædictis separatibus summis* of 2000*l.* and 2000*l.* against the defendants jointly; this is error, and all the justices agreed that it is not amendable; but if the motion for amendment had been made the same term in which the judgment was given it might have been amended. Ld. Raym. Rep. 182. Pasch. 9 W. 3. Villars v. Parry and Moor.

Ld. Raym.  
Rep. 695.  
S. C. but  
S. P. does  
not appear.  
— 2 Ld.  
Raym. Rep.  
895. S. C.  
& S. P. ac-  
cordingly,  
and this and

20. In debt upon a *mutuatus*, the judgment was entered as of Hilary term, 1700, whereas the borrowing appeared to be 2d April 1701. Upon writ of error brought, a motion was made to amend the judgment by the *Paper-Book* signed by the master, which was 2 January, 1700, the court allowed it to be done, for it was but a slip of the clerk, who should have perused the *Paper-Book* signed by the master, which is authentick enough to amend by. 1 Salk. 50. pl. 13. Mich. 2 Ann. B. R. Parsons v. Gill.

another amendment prayed, viz. to insert the words (*Per J. S. attornatum suum*) were granted on the defendant in error's paying costs, and consenting that the judgment should be affirmed without costs, because there was a good error at the time of the error brought. — Comyns's Rep. 117. S. C. but S. P. does not appear.

2 Salk. 676.  
S. C. but  
not S. P. —  
Gilb. Equ.  
Rep. 16.  
S. C. but  
not S. P. —  
11 Mod.  
210. S. C.  
but not S. P.

21. The court was moved to amend a judgment entered Hill. 3 & 4 J. 2. against John Earl of Anglesea, and that James might be entered instead of John, and the release of error was produced which was made by James; sed negatur, per cur. because as the matter now stands there is no judgment against James, and to make such an amendment may possibly affect a purchaser upon valuable consideration, and may make the executor guilty of a *devastavit* by paying inferior debts, though no judgment was standing out against the testator, which would be unreasonable. MS. Rep. Trin. 12 Ann. C. B. Anon.

22. It was moved after error brought & in nullo est erratum pleaded, to amend the judgment roll by striking out that the plaintiff (*ought to recover*) and inserting that the plaintiff (*do recover*) which

which was ordered on payment of costs, provided defendant do not farther prosecute his writ of error. Barnes's Notes of C. B. 118. Pasch. 10 Geo. 2. Foster v. Blackwell.

(K. a) Defects in Writs of Error, amended. In [ 375 ]  
what Cases.

See stat. 5,  
Geo. 1. cap.  
13. at (R)  
supra.

1. *W. T. recovered, and writ of error was sued, by which the record was certified in the name of E. T. and because it appeared that the first writ and count was good, and this certificate was only misprision of the clerk, the record was amended by advice of all the justices of B. R. for it was said, that now all the record was before them, and nothing in the bank of record. Br. Amendment, pl. 53. cites 21 H. 7. 31.*

2. *Writ of error was sued to remove a record out of C. B. into B. R. between an abbot and J. N. the warrant of attorney varied in the roll in the name of the abbot, and was amended after judgment, and if they had not amended it, they said that those of B. R. would amend it. Br. Amendment, pl. 85. cites Pasch. 23 H. 8.*

3. *It was moved to quash a writ of error on an exception taken to it as it was entered in the record, but because it was only a mis-entry, the record itself being right, the record was ordered to be amended by the writ. Sty. 218. 219. Trin. 1650. Dawkes v. Payton.*

4. *A writ of error recited a judgment given in curia regis when it should be regis & reginae. It was moved to amend it, for that the note to the cursitor was right, and this was a misprision only in matter of form, and not in skill; sed non allocatur, for there is no fault in the writ itself, only it does not agree with the record, and the amendment will make a new writ. The 8 H. 6. gives the court power to amend in matters precedent to the judgment, and to support judgments, and to avoid writs of error, whereas this may make good the writ of error, and so to reverse a judgment; besides, this writ is a commission to the court, and they cannot amend their own commission. 1 Salk. 49. pl. 9. Pasch. 12 W. 3. B. R. Thompson v. Crocker.*

12 Mod.  
369. Thom-  
kin v.  
Crocker,  
S. C. ac-  
cordingly,  
and Holt  
Ch. J. said,  
that there  
is no in-  
stance of  
amending  
writs of  
error. —  
Carth. 520.  
Tonkyn v.

Crocker, S. C. and it was insisted that it was an alteration, and not an amendment, which was moved for, the record now returned being a wrong one, and if the writ be altered to the record, then it would be a right record, and consequently here will be a record or no record according to the alteration, or no alteration of the writ, and thereupon the court denied to alter it. — Ld. Raym. Rep. 564. Tomkin v. Crocker, S. C. and Holt Ch. J. said, that no precedent can be shewn where a writ of error has been amended; and the amendment was denied.

5. *An action was by the name of Gigger, and a writ of error was brought as in an action between Giggure and the defendant. The court held this to be a fatal variance, and that the record was not removed by this writ of error, but at last the record was amended. 1 Salk. 264. Pasch. 1 Ann. B. R. Gigger's case.*

6. *In error upon a judgment in C. B. the court was moved to*  
F f 3 *quash*



quash the writ for a variance between it and the record returned; the writ described a *loquela inter Lowther and 4 defendants*, wherein judgment had been given against 3, whereas the judgment in the record returned was only against 2; the writ was quashed, and Parker Ch. J. said, that the Ch. J. of C. B. should, upon the writ, have returned Nul tiel record. MS. Rep. 3 Geo. 1. B. R. Dawson v. Lowther.

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7. Error was brought to reverse a judgment in C. B. in ejectment. The writ of error was tested 23 Oct. 12 Geo. 1. returnable *octabis Martini Mich. term*, 12 Geo. 1. and by the record certified the judgment appeared not to be given till Hill. term following 12 Geo. 1. and thereupon it was held clearly, that the record was not well removed by this writ. The court were clear of opinion that this writ is not amendable by the stat. 5 Geo. 1. cap. 13. for it would be to amend the writ contrary to the truth of the case, the judgment in fact not being given till Hill. 12 Geo. 1. and so the variance not such as was intended to be amended by that act; and the motion for amendment denied. 2 Ld. Raym. Rep. 1531. Trin. 2 Geo. 2. Canning v. Wright.

8. A writ of error was brought by G. to reverse a judgment in C. B. in an action brought against him by M. and the writ described the record to be of a *loquela in C. B. by writ by M. and G.* and the record removed was between M. and G. and so a variance, &c. But the court of B. R. ruled it to be amended and made agreeable to the record, and this by the stat. 5 Geo. 1. cap. 13. And they held they could do it by this act without prayer of either party, the variance appearing to them upon the record; and gave *no costs* as not being directed by the statute. 2 Ld. Raym. Rep. 1587. Pasch. 4 Geo. 2. B. R. Gardiner v. Merrot.

See tit.  
Fines  
(B. b. 2)

### (L. a) Defects in Fines and Common Recoveries, and Writs thereupon, amended.

1. **A** Fine was to the heirs males, and the *scire facias* is made to the heirs general, this shall be amended. Br. Amendment, pl. 113. cites 10 H. 7. 25.

2. A common recovery was suffered to the intent to bar an entail, and the warrant of attorney was, that *Alicia Pinde ponit loco suo A. B. &c.* whereas her name was *Elizabeth*, and so it was assigned for error that no warrant of attorney was entered for Eliz. The quære was, if this were amendable, and the book says that it was amended afterwards. Mich. 1 & 2 P. & M. D. 105. Pind v. Norton.

Noy 73.  
S. C. ruled  
according-  
ly, though  
it was an  
original  
writ.

3. In formedon the writ was *Præcipe quod reddat 20 acres Hed- dington*, not saying (*in Heddington.*) The cursitor upon oath confessed that the paper delivered to make out the writ by, had the word (*in,*) and therefore it was amended by order of the court, it being only the default of the clerk. Cro. E. 644. pl. 49. Mich. 40 & 41 Eliz. B. R. Powell v. Brazen-Nose College.

4. In



4. In a *formedon* of the manor of *Isfield*, the tenant pleaded in bar a common recovery against the donee in tail. The plaintiff replied *Nul tiel record*. A record was produced where the name was *Iffield*, instead of *Isfield*. It was resolved, that if it appeared to be the mistake of the clerk, or corrupted after, it should be amended. 5 Rep. 46. a. Trin. 41 El. C. B. Cook's case, alias *Challoner v. Cook*.

Noy 1.  
Thompson  
v. Warrar,  
S. P. and  
seems to be  
S. C. ad-  
judged  
against the  
demandant.  
— S. C.

cited by Williams J. Bulst. 7.—It was moved to amend a fine, in which Sir John Forth was conusee, and Sir Manwaring conusor, which was levied of the manor of *Igbfield*, where the deed which declared the uses was of the manor of *Igbfield*, which was the true name, and it was amended. 1 Ld. Raym. Rep. 209. Pasch. 9 W. 3. C. B. Anon.

5. In the 3d proclamation upon the foot of a fine levied in Trin. term 5 Jac. the said proclamation is said to be made 6 Jac. and upon the foot of the fine the 4th proclamation is wholly left out; but because upon view of the proclamations indorsed upon record remaining with the chirographer, and the book in which the proclamations were first entered, it appeared that the said proclamations were rightly and duly made, it was adjudged that they be amended. 13 Rep. 54. Trin. 7 Jac. C. B. Pettus v. Godsalve.

6. In a recovery agreed to be suffered by A. B. and R. C. the writ of entry was sued out in the name of J. C. instead of R. C. but ordered to be amended. Rep. of Pract. in C. B. 127. cites Trin. 2 Car. 1. Clapham v. Bacon.

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7. A warrant to suffer a recovery by W. R. and Hester his wife. The serjeant had certified that the warrant was given by W. R. and Margaret his wife, and the mittitur and transcript made, and the recovery entered accordingly, but ordered to be amended. Rep. of Pract. in C. B. 127. cites Mich. 4 Car. 1. Anon.

8. A recovery entered by A. B. and C. his wife, but the name of the wife totally omitted, ordered by the court to be amended. Rep. of Pract. in C. B. 127. cites Mich. 8 Car. 1. Thurban v. Pantry.

9. A fine was levied Mich. 11 Eliz. and the proclamations indorsed by the chirographer were right; but in the note of the fine delivered to the custos brevium, the 2d proclamation was entered to be made the 20 May by the misprision of the clerk, where it should have been the 23 May. The court held that it should be amended; for the engrossment upon the fine by the chirographer is the foundation, which being right, is a sufficient warrant to amend the other, though the court held it a good fine without any amendment. Hutt. 122. Pasch. 9 Car. Strilley's case.

10. A fine and proclamations, as found in the office of the custos brevium, were exemplified under the great seal. It was objected, that by a clause in 23 Eliz. cap. 3. they could not be amended after such exemplification; but it was answered that that statute extends only to fines before levied, which should be exemplified before the 1st of June 1582, and that the latter clause in the said statute extends only to fines exemplified according to the said statute. Hutt. 122. Pasch. 9 Car. in Strilly's case.

11. A recovery was suffered, but the writ of seisin was made re-

*turnable the same return as the writ of entry.* The return was ordered to be amended. Rep. of Pract. in C. B. 127. Pasch. 16 Car. 1. Doncaster v. Champion.

1811 says

the writ

Amend.

no its were

ordered to

be made

Mich. 5 W.

& M. Wattray v. Jodrell, and Mich. 5 W. & M. Warkhouse v. Watts.

12. The writ of entry was made *returnable tres Mich.* 33 Car. 2. which was *before the date of the deed*, to make a tenant to the præcipe; and ordered to be amended by making the writ *returnable crastin' animarum*. Rep. of Pract. in C. B. 127. Mich. 4 W. & M. Bunce & al' v. Greenway & al'.

13. It was moved to amend a *recovery suffered* by Jane Knight, the *lands being said* in the recovery *to lie in parochia Sanctæ Mariæ Salvatoris in Southwark*, whereas there is *no such parish*; for the proper name is Sancti Salvatoris. And the court gave him leave to rase the word (Mariæ). And per Treby Ch. J. the vulgar name is St. Mary Over-ree, that is, Over the River; but Sancti Salvatoris is the name used in pleadings. 1 Ld. Raym. 134. Mich. 8 W. 3. Anon.

14. Upon the certificates of the custos brevium, Mr. Prothonotary Tempest, and the clerk of the warrants of this court, said, that the writ of entry and writ of seisin between the parties had been duly issued; and also that the *recovery* in this cause was *taken at the bar* of this court of the term of St. Michael, *in the 8th year of K. Charles the 1st, all the parties in the said recovery named, then and there appearing in their own persons*. It was ordered that the said recovery should be entered of record of that same term of St. Michael, upon the 134th roll, among the rolls of the pleas of land inrolled in that term. Rep. of Pract. in C. B. 127. Trin. 12 W. 3. Ives & al' v. Young.

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See (B. a)  
pl. 26. Ld.  
Jeffries's  
case.

15. A writ of covenant was *tested 6 months after the dedimus*; but the court of grand sessions in Wales had amended it, and this matter being referred to the judges, Holt Ch. J. & al' certified, that the writ of covenant being an original, was not amendable either by the common law or by any statute, and that there is no difference as to this purpose between amicable and adversary actions. 1 Salk. 52. The Earl of Pembroke v. Lord Jefferies.

16. On motion to amend a writ of entry *by putting out Cowick-bury, and inserting (in paroch' de Sheering,)* it appeared that the deed to lead the uses thereof was right; and upon producing several precedents for amendment (among which were those cited above in pl. 6, 7, 8.) a rule was granted (upon great deliberation) to amend. Rep. of Pract. in C. B. 9. Hill. 2 Geo. 1. 1715. Bedford v. Cullen.

17. A motion to amend a recovery in Hill. 1703. wherein *West-Engleston and West-Tyneham* was put in the writ of entry, *instead of Ingleston Tyneham*. The deed to lead the uses was right; E. J. who was one of the vouchees was dead, the other parties alive and consenting; and it appearing that it was the intent of all the parties that it should be right, and common recoveries being common assurances, amendments ought more easily to be made than in other cases; therefore the court ordered it to be

be amended accordingly. Rep. of Pract. in C. B. 17. Trin. 5 Geo. 1. *Laming v. Bestland*.

18. A motion to amend a recovery by putting in these words, *In paroch' Sanctæ Mariæ in Wallingford, and in paroch' de War-grove*, and a rule to shew cause granted; this was afterwards opposed strongly, 3 justices against the amendment; but Tracy seemed for it, though the parties were all dead, and purchasers in the case. It was denied chiefly because, if the amendment was made, the king would lose his fine for the parcels to be inserted. Rep. of Pract. in C. B. 25, 26. Trin. 10 Geo. 1. 1724. *Dean & al' v. Coward*.

Ibid. 30. S. C. in Mich. following, there being three new judges the court declared unanimously now, that though the

parties were dead, yet as it appeared by the deed that it was with their consent, the vills omitted by the clerk should not prejudice a family; and therefore it being the intent of the parties at that time, the court ordered the amendment to be made, and so made the first rule absolute.—Comyns's Rep. 386. Trin. 12 Geo. 1. S. C. accordingly.

Motion to amend a recovery by putting in, *Rectoria de lea & decima eidem spectan'*, it appeared to be right in the deed to lead the uses, and moved at the vouches's request. The Ch. J. said the king will lose his fine; so the amendment was denied. Rep. of Pract. in C. B. 26 Trin. 10 Geo. 1. *Cranmer v. Cranmer*.

19. A motion was made last term to amend a fine by inserting the word (*Woorth*,) and this present term on shewing cause, the rule was made absolute for the amendment, though it was objected that the heirs at law would be prejudiced if the fine was amended; the court said they could not take notice, whether it would be a prejudice to the heirs at law or not; but it was the duty of the court to make the fine agreeable to the deed and intention of the parties. Rep. of Pract. in C. B. 52. Pasch. 2 Geo. 2. 1729. *Walter v. Okeden*.

20. A motion to amend a recovery by inserting several parishes which were left out in the instructions to the cursitor, it appeared that the deed to lead the uses of the recovery was dated the 7th of October, the writ of entry tested the 11th of Decemb. and returnable in mensem Mich. The court ordered the recovery to be amended. Rep. of Pract. in C. B. 85. *Jenkinson v. Staples*.

21. It was moved to amend a fine by striking out the words, *In America in partibus transmarinis*, this fine was of lands and tenements in the island of Antigua, or otherwise Antigua, in paroch' Sanctæ Mariæ Islington, in the county of Middlesex, and was past in the year 1714. Application had been made to the Master of the Rolls, and an order made by his honour for the amendment, which order was set aside by my Ld. Chancellor. After great debate in this cause (a writ of error being depending) the judges were unanimously of opinion that this court had the only cognizance of fines, and ordered the same to be amended. Rep. of Pract. in C. B. 121. Trin. 8 & 9 Geo. 2. *Foster v. Pollington & al'*.

Barnes's Notes in C. B. 143. S.C. and per cur. the repugnancy inserted

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merely through want of skill, and which would vitiate the fine must be rejected, and the fine made effectual, viz. in common form; but if it be then insufficient, advantage may be taken thereof.

22. A rule to compleat a recovery of Easter term the 9th of Queen Ann. the præcipe at bar was signed by Serjeant Richardson, the plea roll entered, and the exemplification ingrossed but not sealed, and neither the roll carried in, nor the writs filed; upon reading the deeds

deeds and affidavit of notice to the respective parties, the recovery was ordered to be compleated, and the rolls and writs to be filed. Rep. of Pract. in C. B. 126. Hill. 9 Geo. 2. Sheppard v. Harris, Dewey, & al'.

(M. a) Omissions and Defects in Entry of Warrants of Attorney, amended.

1. **A** M A N had put warrant of attorney in the remembrance and neglected to enter it, and it was amended. Br. Amendment, pl. 69. cites 41 E. 3. 1.

2. Warrant of attorney in formedon was put, quod tenens po. lo. suo against the demandant in plea of scire facias, where it was formedon, and it was amended; quod nota. Br. Amendment, pl. 36. cites 19 H. 6. 15.

3. Forcible entry found for the plaintiff. Markham said the judgment ought not to go, for the defendant appeared by attorney who had no warrant in court. But per Newton, it may be that some justice of this court has the warrant in his hands, or that he was made attorney by writ, and therefore no cause by which the plaintiff recovered; quod nota. Br. Repleader, pl. 17. cites 19 H. 6. 6.

4. If clerk of the essoigns enters warrant of attorney in the remembrance and does not enter it upon the record, this shall be amended, and this in another term. Br. Amendment, pl. 14. cites 35 H. 6. 24.

Br. N. C. 230  
H. 8. pl. 26.  
cites S. C.

5. Warrant of attorney varied from the name of the corporation party, and writ of error was brought to those of C. B. and they amended it immediately. And it was said that the court of B. R. would have done the like there; quod nota. Br. Amendment, pl. 47. cites 24 H. 8.

6. A bill was exhibited in the name of Rigs, per Johannem Keeling attornatum suum, and the warrant of attorney was, that Rigs posuit loco suo Gulielmum Keeling. This was assigned for error; but the justices caused it to be amended, and affirmed the judgment. Mo. 711. pl. 996. Hill. 38 Eliz. Heley v. Rigs.

7. In debt by C. H. executor of C. H. against R. as son and heir of R. After judgment by default a writ of error was brought, and the error assigned was for the want of a sufficient warrant of attorney for the plaintiff, which was thus, viz. C. H. Miles ponit loco suo J. S. attornatum suum versus J. K. the plaintiff not naming his executor as he should have done; but it was held to be amendable, there being no other action depending between the parties. Cro. J. 135. pl. 9. Mich. 4 Jac. Hilliard (Sir Christopher) v. Redner.

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8. Error, &c. on a judgment in a formedon in descender. The error assigned was for default of a warrant of attorney, because it was in this manner, H. B. ponit loco suo . . . Darby attornatum suum, omitting his name of baptism; and held to be error not aided by any statute, nor amendable. Cro. J. 332. Mich. 11 Jac. Bartholomew v. Belfield.

9. A warrant of attorney was given to S. to *confess a judgment* at the suit of the plaintiff. S. sent it to W. his entering clerk, who entered it accordingly *Quod recuperet debitum & damna sua*, but left a blank to insert what sum should be for the damages. W. died, and this warrant of attorney was lost, but S. made affidavit of the fact; and upon a motion for leave to insert a sum certain for the damages and costs, the court held it to be amendable, if there had been any thing to amend it by. It might have been amended in the same term, but in this case the entry was 19 years ago. 5 Mod. 147. Hill. 7 W. 3. B. R. Wentworth v. the Earl of Strafford.

Ld. Raym. Rep. 68. S. C. mentions it as a judgment recovered for 3000 l. and that the motion was to insert a sum certain for the costs and damages, however

small, to perfect the judgment. But after several arguments at the bar, Holt Ch. J. held it could not be granted, because it would be to give a new judgment. But Rookby J. thought it might be amended, because it was for a just debt. Adjournatur.

10. The entry on the top of the plea roll was, that the plaintiff *ponit loco suo, J. S. attorn' suum*; and the memorandum was, that the plaintiff *venit & protulit, &c.* but did not say *per attornatum suum, or in propria persona sua*. Error being brought in the Exchequer-Chamber, it was moved to amend the declaration by the top of the plea roll; and Holt Ch. J. held it might be done; for a warrant of attorney upon the plea roll is as much a record as if entered on any other roll, and it cannot be intended but that the plaintiff declared by attorney, his name being to the judgment paper, viz. J. S. pro quer. 1 Salk. 88. B. R. Trin. 2 Ann. Parsons v. Gill.

Ld. Raym. Rep. 695. S. C. but S. P. does not appear. — 2 Ld. Raym. Rep. 895. S. C. & S. P. and Powis and Gould J. agreed with Holt; but Powell J. disagreed as

to the taking the entry of the warrant of attorney on the plea roll for the foundation only, and putting the judgment paper signed by the master, and which was right, and which the roll was to be made up by, out of the case, because though that proved the parties had attorneys in court, yet, notwithstanding that, the plaintiff had election to sue either in person or by attorney, and that entry did not prove he sued by attorney, and so there was no authority to amend by. — Comyns's Rep. 117. pl. 82. S. C. but S. P. does not appear.

11. A warrant of attorney filed was moved to be amended, and to make it *debt instead of case*; and upon hearing counsel on both sides, and citing many cases, the court ordered it to be amended, and if the adverse party does not proceed in error, costs to be paid him. Rep. of Pract. in C. B. Pasch. 1 Geo. 2. the Dutch East India Company v. Henriques & al'.

## (N. a) Omissions and Defects in entering Pledges, amended.

1. **I**N assise the writ was *Et interim fac. 12. &c. videre tenementa ill' & sum' eos quod sint coram præfat' justiciar', &c. Et pone per vadios et salvo pleg' prædictum W. vel Ballivum suum, &c. si, &c. quod sit ibi audiend' ill' recogn'* and because it ought to be *Quod tunc sit ibi*, and this word (*tunc*) was wanting, the assise was adjourned, and they were clear in opinion to abate the writ; and the plaintiff was nonsuited. Brooke says, Quære if it shall not be amended; for it is said there, that it has been used to amend such writs,

Br. Brief, pl. 21. cites S. C.



writs, and so it was done before Sir R. Newton. Br. Affise, pl. 4. cites 27 H. 6. 2.

2. *Decem tales returned, & nullos manucaptos juratorum returned, and the jury passed, and the plaintiff recovered, and the defendant brought writ of error, and it was debated if it should be amended; for it was said they may amend misprision as well after judgment as before, upon examination of the sheriff, &c.* Choke justice said, this is not misprision, but nonfeasance, therefore it shall not be amended; and the sheriff cannot put manucaptors without being found by the parties, for they find the manucaptors, therefore this is the default of the parties; but per Genney, at the first day before that they were sworn, it might have been amended, but not after judgment. Br. Amendment, pl. 47. cites 9 E. 4. 14.

3. *Pledges were found for W. T. where his name was T. T. this cannot be amended.* Br. Amendment, pl. 47. cites 9 E. 4. 14. per Catesby.

4. Note, that where the sheriff returns manucaptors upon *dis-tringas juratores*, and no pledges of the manucaptors, and yet the jury appeared, and were sworn, and found for the plaintiff; and exception was taken in arrest of judgment, and the sheriff was thereof examined, who said, that his intent was that it should be well returned, and therefore by advice of all the justices of both benches, except Brian, it was amended, and the plaintiff recovered. Br. Amendment, pl. 61. cites 3 H. 7. 14.

5. It was moved in arrest of judgment, that upon the return of the *venire facias* there wanted these words, *Quilibet jurator per plegios*, so that the writ was as if it had never been returned; but held per cur. that *this was* not as a blank return, or where the name of the sheriff is omitted, but it is an *insufficient return*, which is aided by the statute of Jeofails, for the omission of the pledges is but matter of form. Cro. J. 534. Pasch. 17 Jac. More v. Blackwell.

Hutt. 92. S. C. accordingly; besides, it concerns the king; for if there be cause to amerce the plaintiff, the judgment is, that the plaintiff

6. After verdict and judgment for the plaintiff in assumpsit, error being brought and assigned that there were *no pledges entered upon the imparlance roll*, it was moved that it might be amended, because *in the nisi prius roll the pledges were mentioned*, and it being only *matter of form*, was aided after verdict, by 18 Eliz. cap. 13. [14] but the court denied the amendment, for although the *issue roll shall be amended by the imparlance roll*, because it is precedent, yet the *imparlance roll shall not be amended by the issue roll*, it being subsequent, and this is *matter of substance*. Cro. C. 91. pl. 15. Mich. 3 Car. Wolfe v. Hole.

and his pledges be amerced, and that is not aided by the 18 Eliz. quod quære.———Litt. Rep. 72. Woolf's case, S. C. and by Crooke the stat. of Eliz. will not help substantial errors.

Sid. 84. pl. 12. Trin. 14 Car. 2. B. R. Wheeler v. Wilkinson, S. P. and it was agreed, that if no pledges had

7. In error of a judgment in C. B. for that there were no pledges, it was insisted in B. R. that it was amendable, or at least aided by the 18 Eliz. cap. 13. [14] because in C. B. the pledges are always indorsed upon the original, and when there is no original there are no pledges. The court advised to pray a certiorari upon alleging diminution; and upon return that there was no original,



ginal, the court debated it largely; and Windham J. thought it was aided by the statute of 18 Eliz. but Foster and Twilden e contra; but upon examination, and no diminution alleged that there was an original, an amendment was awarded. Raym. 51. Mich. 13 Car. 2 B. R. Hodges v. Hodges.

been found it should be error; but per cur. in this case it shall be intended that

pledges were found upon the original (though it cannot now be known) because in C. B. they are not wont to enter the pledges upon the roll, but only upon the original, and so no original is aided by the statute, though an ill original is not.——Error was assigned, for that no *pledges* & *prosequendo* were returned on the back of the writ, but the sheriff was permitted to amend it. 3 Lev. 361. Pasch. 5 W. & M. in C. B. Nicholas v. Chapman.

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(O. a) Omissions in Writs and other after Proceedings, amended.

See (B) pl. 16. and (E) pl. 5. 8. 9. 10.

1. **I**N *præcipe quod reddat R. son of W. of Clyen, Knight was vouched by the tenant himself, and the tenant and the vouchee were one and the same person, and in the process Clyven and Knight were left out, and it was awarded to be amended, per cur. Br. Amendment, pl. 19. cites 40 E. 3. 36.*

S. P. for it was taken to be the misprision of the clerk. Br. Discontinuance de

Process, pl. 46. cites 40 E. 3. 36.

2. In writ of *appeal* this word (*Habeas*) was omitted, and for this cause it was abated, for the court would not amend it. Thel. Dig. 223. lib. 16. cap. 6. f. 2. cites Mich. 13 E. 3. Amendment 63. fine Assensu Partium.

3. *Summons ad warrantizandum* was awarded against 2 in the premisses of the writ, and in the perclose was but one, and it was amended. Br. Amendment, pl. 100. cites 3 H. 4. 11.

4. In detinue the *parol* was without delay by protection, and after re-summons was sued, which made mention that the *parol* was put without day by protection, bearing date the 1st day of January, where the protection bore date the 1st day of June, and the roll was well by which the plaintiff would have amended it; and the opinion of the whole court was, that it shall not be amended, because it is as strong as the original. Brooke says, Quod mirum! for the original, which is founded upon record or specialty, shall be amended. Br. Amendment, pl. 2. cites 3 H. 6. 45.

5. *Præcipe quod reddat*, that is to say, writ of entry against 4, and in the clause (*& nisi fecerit*) were 3, and the 4th was omitted, and it was challenged, [but] because it was a petit default, and the demandant [had] prayed leave to amend it before that it was challenged, therefore it was amended; quod nota; for the court said, that of custom such defaults have been amended before challenge of the party. Br. Amendment, pl. 35. cites 8 H. 6. 37.

6. *Formedon upon a gift made to R. and J. as feme, and that after the death of R. to the demandant as heir, &c. descendere debet*, and did not say after the death of J. and therefore the writ was abated without amendment, because it does not appear to the court if J. was dead or alive. Br. Amendment, pl. 84. cites 11 H. 6. 28.

7. It

7. It is reported by Martin, that an original was amended, where it was 20 *die Junii*, and (*die*) was left out. Thel. Dig. 224. lib. 16. cap. 6. f. 11. cites 11 H. 6. 2. 17.

In maintenance, if the place where the plea was held be omitted in the writ, it is not amendable; per Prisot. Thel. Dig. 224. lib. 16. cap. 6. f. 20. cites Hill. 34 H. 6. 27.

8. In writ of *champerty* directed to the sheriff, it did not appear of which part the maintenance was made, by which the plaintiff purchased a new writ; for the other could not be amended. Thel. Dig. 224. lib. 16. cap. 6. f. 13. cites Mich. 22 H. 6. 8.

The omission of *Dei gratia* in the stile of the king, is amendable; but the omission of any thing that alters the form of the writ, is not amendable. 8 Rep. 160. Mich. 8 Jac. in Blackmore's case.

9. But it was said that such writ *Henricus rex Angliæ & Franc'* without saying *Dei gra'* may be amended. Thel. Dig. 224. lib. 16. cap. 6. f. 13. cites Mich. 22 H. 6. 8.

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Thel. Dig. 224. lib. 16. cap. 6. f. 15. cites S. C.

10. *Præcipe quod reddat* was *Præcipe R. B. & J. C. quod reddat, &c.* And by another *præcipe* in the same writ [it was] *Et præcipe J. T. quod reddat, &c.* and in the summons in the same writ was *Et summoneas prædict' R. & J.* and the demandant prayed that it be amended. But per cur. it cannot be amended; for it does not appear to the court which J. is left out, and so was the opinion of the court; for there were two J's. Br. Amendment, pl. 6. cites 27 H. 6. 6.

Br. Amendment, pl. 94. cites 28 H. 6. 11. S. P. [and it is at 11. b. 12. a. pl. 24]—

Br. Error, pl. 13. cites S. C.—Br. Faux Latin, &c. pl. 89. cites S. C.—Fitzh. Error, pl. 30. cites S. C.

11. The writ of *error* was *Rex Johanni Prisot capitali justic', &c. salutem. Quia in recordo & processu, &c.* which was *Coram vobis* inter A. &c. where it should be *Coram vobis & sociis vestris*, and was not amended. Thel. Dig. 224. lib. 16. cap. 6. f. 17. cites Trin. 28 H. 6. 14.

12. In debt the writ was by *Jo. Gargrave, esquire*, and the obligation was *Jo. Gargrave only*, and it was not amended, but abated, inasmuch as this misprision was of the part of the plaintiff. Thel. Dig. 224. lib. 16. cap. 6. f. 18. cites Mich. 30 H. 6. 6. Amendment 37. Quære.

13. It was agreed, that where *divers things in the writ of conspiracy* are omitted in the count, it shall be amended; quod nota; for it is misprision of the clerk. Br. Amendment, pl. 8. cites 33 H. 6. 2.

14. Where things in the writ are omitted in the count, this omission shall be amended, per cur. but not the other matter. Br. Conspiracy, pl. 2. cites 33 H. 6.

15. If clerk of the *essoign* enters challenge of the *consuance of plea* in his remembrance, and after does not enter it in the roll, this shall be amended; per Billing; by which he took issue that the land is out of the franchise, &c. and therefore it seems that it may be amended. Br. Amendment, pl. 14. cites 35 H. 6. 24.

A title was rehearsed to be, that one

16. Formedon was, viz. *And which after the death of J. the son of the donee, descendere debet to the demandant.* Billinge demanded

manded judgment of the writ; for he makes J. heir to the donee. Littleton said my titling is *son and heir*, which the clerk saw; and therefore it is the default of the clerk, and prayed that it might be amended. Prisot said it is no matter for your titling, which you keep; but the *clerk of the Chancery used to make titling*, and therefore he shall be brought and examined, and if his titling be as you say, it shall be amended, and otherwise not. Quod nota, for non negatur; but Littleton assented. Br. Amendment, pl. 56. cites 38 H. 6. 4.

*W. was seised in fee, and died seised, and the land descended to R. as son and heir, and from R. to H. as son, and did not say heir, and from H. to*

*E. as son and heir.* And per cur. it shall not be amended where this word (*heir*) is omitted at H. For *matter in fact* cannot be amended; for then peradventure the court shall make a falsity; for peradventure H. is not heir. Br. Amendment, pl. 113. cites 10 H. 7. 25.

17. In debt the plaintiff counted upon an obligation. The defendant imparled till another term, and then he demanded judgment of the count; for he said that there is no place laid where the obligation is made, but a space was left in the roll for it, and it was not suffered to be amended. Br. Amendment, pl. 68. cites 4 E. 4. 14.

Fitzh. Amend-ment, pl. 49. cites S. C.—Br. Brief, 482. (478) cites S. C.—

Br. Count, pl. 61. 64. cites S. C.—8 Rep. 161. a. cites S. C.

18. *Scire facias* upon a fine, which was to him and his heirs male, and the mittimus was *Ad prosecutionem J. T. consanguinei & hered.* without mascul', and it was doubted if it may be amended. Per Fairfax, if writ judicial varies from the original, it shall be amended; so if writ of debt varies from the obligation; for this is the default of the clerk who sees the record and the specialty, if this matter be found upon the examination of the clerk. But per Pygot, a thing which ought to come by \* information of the party, as the vill, mystery, or the like, shall not be amended; & adjournatur. Br. Amendment, pl. 48. cites 9 E. 4. 15.

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\* See pl. 21.

19. Writ was *J. S. clerk*, in debt upon an obligation, and in the count it was *abbot of D.* and *J. S. clerk* was omitted, and it was amended because it was in one and the same term. Br. Amendment, pl. 112. cites 4 E. 4. 25.

S. P. Br. Abbe, pl. 31. cites 4 E. 4. 24.

20. In *præcipe* quod reddat, if the sheriff delivers the writ in court without indorsement, it may be amended before process awarded upon it; per Genney. But per Moyle, This is *Ex gratia curiæ*. But Genney said *Not after grand cape awarded*, and judgment given, for this issued upon writ ill returned; but per Choke, that which is once mistaken is always mistaken; quod Danby concessit; and yet per Littleton, we may amend several things before judgment, which cannot be amended after; for then the party shall lose the advantage. Br. Amendment, pl. 47. cites 9 E. 4. 14.

21. Bill was sent into Chancery upon an obligation against J. N. and the intent of the plaintiff was to have it in London, and this word (London) nor no other county was put in the teste nor margin of the bill, as it ought to be in every bill of indictment. And they were at issue in Chancery, and venire facias awarded in B. R. who tried it, and passed for the plaintiff. And exception was taken in arrest of judgment, and it was amended per cur. after verdict, quod nota, and in another court, and yet this ought to have been of the information of the party, and then it is not properly

perly misprision of the clerk. Br. Amendment, pl. 88. cites 2 R. 3. 12.

22. Where a *thing usual* is omitted, as the defence or averment *Et hoc paratus est*, &c. and the like, this cannot be amended. Br. Amendment, pl. 113. cites 1 H. 7. 23.

Br. Return  
de Brief,  
pl. 9. cites  
S. C.

23. It was held that, if the sheriff *returns upon a capias against J. and N. quod virtute brevis mihi directi cepi corpus J. and N.* and does not say, *Infranominat*, this is misprision, and shall be amended, but by the reporter it is good without amendment. Br. Amendment, pl. 64. cites 12 H. 7. 19.

24. *Debt upon a recovery of damages in assise, the teste of the writ upon assise was not expressed.* And per cur. this may be amended. Br. Amendment, pl. 114. cites 13 H. 7. 21.

25. In a *Quare impedit* against the Bishop of Lincoln, the writ was *suam spectat donationem*, the word (*ad*) being omitted; it was held by the whole court to be amendable. Golds. 78. pl. 12. Hill. 30 Eliz. Brookesby v. Bishop of Lincoln.

Nov 57.

S.C. the ob-  
jection was  
not allow-  
ed.—Ow.

59. S. C.

but S. P. does not appear.—Mo. 465. pl. 657. S. C. but S. P. does not appear as a point in that case but cites it there as a point in the case of Bissley v. Hungerford, and that it was good after verdict and amendable, because it cannot be intended of other names than the names of the jurors.—So where the venire facias wanted the words (*Et habeas ibi nomina juratorum*) but the words *Venire facias duodecim*, &c. were inserted, all the justices seemed that it was good, and that the first words are supplied in the last, and are aided by the statute of Jeofails after verdict. 2 Brownl. 167. Pasch. 10 Jac. C. B. Barde v. Stubbing.

27. An original writ was returned by the sheriff and his Christian name omitted; the court would not allow it to be amended. Goldsb. 113. pl. 3. Mich. 39 & 40 Eliz. Broughton v. Flood.

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28. A record of nisi prius in an action of *debt upon an obligation*, with condition to pay such a sum at such a feast next after the date of the obligation, the day of the date was omitted in the record of the nisi prius, so that it doth not appear which shall be the next feast, at which the money ought to be paid after the date; and by all the justices, it was *no perfect issue*, and for that the justices of nisi prius have no power to proceed upon it, and it shall not be amended, otherwise if it had been a good issue, though another thing had been mistaken. 2 Brownl. 47. Hill. 8 Jac. Anon.

29. The clerk that entered the cause had omitted the charge, which was 400*l.* and it was omitted in the roll and nisi prius. After verdict exception was taken and amended by the court. Brown. 26. the Earl of Cumberland v. Hilton.

2 Bull.

339. Ewer  
v. Cham-  
berlaine  
S. C. ruled  
according-  
ly, and  
Coke

Ch. J. cited  
10 H. 7.  
S. P.

30. It was assigned for error that there was variance between the bill filed and the declaration; the declaration was, that *J. S. after the death of tenant pour auter vie primo intravit, and so was occupant*, and in the bill filed, the words (*primo intravit*) were omitted; but because the paper-book, by which the bill was ingrossed, had those words in it, therefore ruled it should be amended. Cro. J. 393. pl. 4. Hill. 12 Jac. B. R. Chamberlaine v. Ewer.

31. In

31. In *debt* in a court of *Piepowders*, the words (*Secundum consuetudinem civitatis illius*) were in the imparlance roll but omitted in the issue roll; the court held this to be only *vitium clerici*, and therefore amendable. Cro. C. 45. 46. pl. 5. Mich. 2 Car. C. B. Hodges v. Moyles.

32. In a *formedon* in the descender, the plaintiff was admitted before one of the justices of C. B. to prosecute in omnibus actionibus, which was entered in the *plea roll* thus, *Concessum est per curiam, that the plaintiff by J. S. his guardian should prosecute, &c.* and the *philizer's roll* was, *that J. Y. by J. S. his guardian ad hoc admissus per cur. obtulit se quarto die, &c.* But there was no entry in the *philizer's roll* as usual, *quod concessum est per tur. quod petens sequatur per J. S. his guardian*; whereupon error was brought: It was the opinion of the court, that notwithstanding error was brought; yet it might be amended, because it appears the justices admitted the guardian ad prosequendum, and the *philizer's roll* is *obtulit se*, so the admission appearing to be before the *obtulit se*, it was the omission of the clerk rather than the act of the court, wherefore it was amended. Cro. C. 86. pl. 1. Mich. 3 Car. C. B. Young v. Young.

Het. 52. Young's case S. C. and the court agreed that it should be amended. — Jo. 177. pl. 1. S. C. but S. P. does not appear. — Hutt. 92. S. C. resolved that it should be entered on the *philizer's roll*,

because this admittance by his guardian is the act of the court and not like the entry of the warrant of attorney, &c. — Palm. 518. S. C. but S. P. does not appear. — Litt. Rep. 60. S. C. & S. P. agreed that it be amended.

33. An *elegit* issued after judgment, and recited the judgment *Quod elegit executionem of the goods, and of the moiety of the land*; and the writ was, *Tibi præcipimus quod bona & catalla, of the defendant quæ habuit die judicii prædicti redditu deliberari facias*, omitting these words (*Et medietatem terrarum & tenementorum*) *tenendum the said goods and the moiety of the said lands*, quousque debitum levetur; the sheriff extended the moiety of the lands and the goods, and delivered the moiety of the lands, and returned the inquisition. It was moved that this was only the misprision of the clerk; but resolved it could not be amended, but the plaintiff might have a new *elegit*, because the inquisition was taken without warrant. Cro. C. 162. pl. 4. Mich. 5 Car. B. R. Walker v. Riches.

34. A *scire facias* against the bail was *Quare executionem*, but (*habere non debet*) was left out; it was prayed that this being a judicial writ might be amended if it were right upon the file; whereupon a search was ordered. Freem. Rep. 138. Trin. 1673. Menate v. Coltlo.

3 Keb. 190. pl. 36. Ma- [ 386 ] nel v. Coltloe, Trin.

25 Car. 2. B. R. the S. C. and the court held that if the writ be so it is not amendable, but the plaintiff must discontinue.

35. *Writ of enquiry* was awarded, and in entering it on the roll, the words *per sacramentum duodecim proborum & legalium hominum*, were left out; per cur. this is amendable, for it is only a misentry of the clerk. 3 Mod. 112. Trin. 2 Jac. 2. B. R. Anon.

36. Covenant that he had not made done or suffered any act or thing to incumber, &c. the breach assigned was, that the de-



fendant ad sessionem Cestrie tent', &c. Anno 4to. Jac. 2. utlagat fuit; upon demurrer, the declaration being held naught for uncertainty in what term the outlawry was, it was moved to amend it; but per Holt Ch. J. disallowed. For to amend upon demurrer when this may be the cause of the demurrer, would be to enure the defendant without cause. 1 Salk. 50. pl. 11. Pasch. 13 W. 3. B. R. Cox v. Wilbraham.

(P. a) Discontinuance or Miscontinuance of Process, amended.

For where judgment is given which makes an end of the plea or process, there if it be erroneous it

cannot be amended. Ibid. ——— Contra where the process still depends, as here, there they shall commence where the process issued first out of court, and shall commence there again; quod nota. Ibid.

1. **I**N *ejectione custodiæ*, process continued till exigent was awarded, by which the defendant alleged discontinuance of process, because the process in this action is summons, attachment, and distress, and not process of outlawry; and per Finch. and Wich. it shall be amended where the process issues first out of court. Br. Amendment, pl. 16. cites 40 E. 3. 15.

2. In *præcipe quod reddat* against 4, one made default, and the other 3 appeared and demanded the view, which was granted, and day given over; at which day he who made default appeared, and the demandant released the default, and he demanded the view, and it was granted, and the others were effoigned, and day given over till now, and now the tenant prayed that the process be discontinued; and hence it seems that against him, who first made default, no process was made, nor day given; and the opinion of the whole court was that it shall be amended, because the process depends yet, and is not determined; quod mirum, that discontinuance shall be amended, but miscontinuance is often amended. Br. Amendment, pl. 17. cites 40 E. 3. 20.

Br. Discontinuance, pl. 47. cites S. C.

3. In *venire facias* in debt a juror was named W. B. and the *habeas corpora* was J. B. and the sheriff distrained W. B. and the opinion was, that the process against the jury was discontinued, and could not be amended; contrary of *miscontinuance*. Note the difference. Br. Amendment, pl. 92. cites 27 H. 6. 5.

Yelv. 156. The court upon citing this case said it should be intended that there

4. A writ was brought by baron and feme, and the parties appeared, and had day till another term; but no appearance was had of the feme, nor any day given her by the roll; and yet inasmuch as it appeared to be the default of the clerk, it was amended. Yelv. 156. in case of *Palton v. Lusher*, cites 26 H. 6. Amendment 33.

was some remembrance in some by-roll, by which the court was instructed that the feme also appeared, though it was not entered in the principal roll.

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S. P. So in trespass against 6, and the

5. *Trespass* by A. against 2, they were at issue and found for the plaintiff, and it was alleged in arrest of judgment that the process was continued in the roll by day given to one only. And by all the justices it shall be amended, for it was the misprision of the clerk;



clerk; for it cannot be intended that the court will give day to the one and not to the other. Br. Amendment, pl. 76. cites 22 E. 4. 3.

mesne process is continued against 5 pl. 38. cites

only, it may be amended; for it is *mispriso clerici*. Br. Discontinuance of Process, S. C.

6. *Contrary where no day is given to either of them.* Br. Amendment, pl. 76. cites 22 E. 4. 3.

Br. Discontinuance de Process,

pl. 38. cites S. C. accordingly.

7. *Trespass was brought by 6, and all the process after the original was to the damage of 5, and not of 6, and they were at issue and found for the plaintiff, and this alleged in arrest of judgment, and it was amended.* Br. Amendment, pl. 76. cites 22 E. 4. 3.

Br. Discontinuance de Process, pl. 38. cites S. C.

8. *Day was given by the court to the parties to another time, which ought not to be; and it was adjudged that it shall be amended. But per Fairfax, if plea be discontinued, and judgment given upon default upon this process, this is error, and shall not be amended; but if judgment be given upon other matter, it shall be amended, viz. the discontinuance, and shall not be error.* Br. Amendment, pl. 60. cites 2 H. 7. 11.

9. Note per Vavisor J. if process be discontinued in assise, it may be continued well enough by consent of the parties, and may be amended. Br. Discontinuance de Process, pl. 24. cites 21 H. 7. 40.

10. If a continuance is to be given to 2, and it is given to one only, that is a misprison of the clerk, and shall be amended, and cites 22 E. 4. 3. Cro. E. 619. pl. 6. Mich. 40 & 41 Eliz. B. R.

11. *But where no continuance is given to the party at all, but to a stranger, it is the act of the court, and not amendable; as where W. brought action on the statute of hue and cry, which supposed that A. his servant was robbed, and the defendant imparled, Et idem dies datus est prædicto A. instead of eidem W. and held not amendable; per tot. cur. præter Gawdy, and so judgment reversed.* Cro. E. 618. 619. pl. 6. Mich. 41 & 42 Eliz. B. R. Walford v. the Hundred of Beners.

12. If a man voluntarily discontinues process, and afterwards purchases a ven. fa. and tries the action, this voluntary discontinuance is not aided by the statute; per Popham. Mo. 403. Pasch. 37 Eliz. in pl. 535.

13. *Three executors recovered in C. B. in debt by default. The defendant brought error, and assigned a discontinuance, viz. That the suit being by 3 executors, and at the day, which they had by the roll upon a continuance, 2 only appeared; and by the same roll day was given to all 3 upon another roll. Per tot. cur. This is a discontinuance, and cannot be amended; for credit ought to be given to the roll, and therefore non constat that more than 2 appeared, and that the 3d made default, which is a non prosecution of the defendant at that day, and shall go to all 3 afterwards, and judgment was reversed.* Yelv. 155. Trin. 7 Jac. B. R. Paston v. Luther.

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14. In debt for rent for 7 years, reserved by lease made in London of lands in Norfolk, the defendant as to two years pleaded *Non detinet*, and issue thereupon; and as to the residue, pleaded that the plaintiff's testator entered into parcel of the land demised, and issue thereupon. The first issue was tried in Trin. term in London, and the 2d issue at Norfolk assises afterwards; but no continuance made by curia advisare vult, from the day of the return of the *distringas* in London to the day of the return of the *distringas* in Norfolk, nor any entry of the judgment respited *Quousque*. The 2d issue was tried as it ought to be in this case. The want of this continuance was assigned for error; but all the justices and barons held that it is aided by the statute of Jeofails as well after verdict as before, and as well where there are 2 verdicts as where there is but one. Cro. J. 528. pl. 8. Pasch. 16 Jac. Smith v. Bower.

14. Motion to amend a record after it was removed by writ of error into the Exchequer-Chamber, because therein was a day given over to the parties from Easter term to Michaelmas term, Trinity being omitted. By Roll Ch. J. This is not a miscontinuance, but a discontinuance, and cannot be amended. Sty. 339. Trin. 1652. Friend v. Baker.

Skin. 46. pl. 18. S. C. says, that Pemberton Ch. Just. thought it amendable, and only the default of the clerk; but that Jones and Dolben took it to be the award of the court, and says it was held by the greater opinion, that this was not amendable by the clerk without

15. Judgment was had on a bond 25 years since, and in one of the continuances from one term to another there was a blank. The executors of the defendant now brought a writ of error, and the plaintiff in the action got a rule to amend and insert the continuance upon suggestion that it was a judgment of a few terms and so aided by the statute of 16 and 17 Car. 2. cap. 8. Thereupon the plaintiff fills up the blank, and the record so filled up was certified into the Exchequer-Chamber. The Ch. Just. held this not a discontinuance but an insufficient continuance, and only an omission of the clerk, and if he had himself filled up this blank without rule, it could not afterwards be set aside; but Jones J. held it a misprision of the clerk and not amendable by the stat. H. 6. since it was not in the same term, and all the proceedings being in the breast of the court, during the term only, it ought to be left blank as it was; and though the writ of error be returned into the Exchequer, that makes no alteration, the record itself still remaining here, and it is only a transcript that is removed thither. Adjournatur. 2 Mod. 316. Trin. 34 Car. 2. B. R. Birch v. Lingen.

order of the court; but if done by him (if according to law) they could not alter it, but they could punish him.

17. *Scire facias* on a judgment bore teste 25 Aprilis 6 W. & M. returnable in Trin. term 6 W. 3. but the entry on the record was Trin. 7 W. 3. and no continuance from Trin. 6. to Trin. 7 W. 3. The defendant pleaded a frivolous plea, to which the plaintiff demurred; it was objected, that the cause was out of court for want of these continuances, so that he could never have judgment; but adjudged, that the plea roll is amendable without aid of the imparlance roll, because continuances, essoigns, &c. are the acts of the court, and at common law they might amend their own

own acts at any time before judgment, though in another term, but their judgments were only amendable in the same term at common law, whereupon the plea roll was amended thus, Memorand' quod alias scil' term. sanctæ Trin. anno sexto, &c. and so the continuances entered down to Trin. 7. and judgment for the plaintiff. 3 Lev. 431. Mich. 7 W. 3. C. B. Chambers v. Moor.

18. After judgment in B. R. and a writ of *error brought*, returnable in the *Exchequer-Chamber*, and error assigned there, this court was moved for leave to continue the bill, and after deliberation Pratt Ch. J. delivered the opinion of the court that the continuances might be entered, because the stat. 9 H. 5. cap. 4. allows amendments for judgment, and upon enquiry it was found to be the constant practice of the court of C. B. and also of this court, and that if *continuances* were not *allowed to be entered after judgment*, most of the judgments of this court might be reversed. MS. Rep. Mich. 5 Geo. B. R. Phillips v. Smith.

Comyns's Rep. 279. 285. Pasch. 4 Geo. 1. S. C. says, that after consideration the court was of opinion that it might be amended, for it ap-

pears that continuances may be entered at any time before judgment, and if they are omitted it is the fault of the clerk, which shall be amended before judgment by the common law, and cites 3 Lev. 431. and every thing which was amendable before the judgment by the common law, may be amended after judgment by the statute of Jeofails, and Pratt Ch. J. said, that they had inquired into the course of C. B. and were informed that after judgment they were entered of course by the clerk, unless restrained by rule of court, so they are always amendable of course in B. R. and there seems to be a difference where there is a mis-entry of a continuance, and where the entry is omitted.

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19. Motion was made to *amend the continuance* on the roll, by *striking out a general return*, and making it a day certain; the action being at the suit of an attorney, the court at first made some difficulty in granting the rule for an amendment, it being *after judgment upon a demurrer*; but upon consideration, continuances being merely the acts of the court, the amendment was ordered. Barnes's Notes of C. B. 4 Hill. 6 Geo. 2. Cooper an attorney v. Younges.

20. Continuances could be amended at common law, as A. brought a bill against B. who vouches C. who enters into warranty, and pleads to issue; there was a ven. fac. and a jurat' inter A. and B. which jurat' ought to have been inter A. and C. because it appears by the record of the issue, and the award of the ven. fac. and the venire itself, that the jurat' ought to be between A. and C. this is amendable, because it was an inrollment against a former record. G. Hist. of C. B. 87, 88.

## (Q. a) Surplusage in Writs, &c. amended.

1. *Recognizance of 100 Marks*, and the writ of execution upon it was 100*l.* and it was amended, but quære what remedy, if execution had been made by the sheriff. Br. Amendment, pl. 97. cites 44 E. 3. 11.

Br. Execution, pl. 20. cites S. C. — Br. Elegit, pl. 2. cites

S. C. — Fitzh. Execution, pl. 35. cites S. C. accordingly, by Thorp, and the same quære by him.

And the protection had the same fault in it, and was not amended, because

it was not made in this court. Br. Amendment, pl. 102. cites 11 H. 4. 7. — Br. Variance, pl. 33. cites S. C. — Br. Misnomer, pl. 72. cites S. C.

\* (Word) is not in the printed statute.

2. Original was *M. of T.* and the *mesne process* was *M. T.* and (of) was omitted, and shall be amended, by the opinion of the court; for the statute is where \* word, syllable, or letter is too much or too little in default of the clerk that it shall be amended. Br. Amendment, pl. 102. cites 11 H. 4. 70.

3. *Trespass upon the statute* 5 R. 2. *ubi ingressus non datur per legem*, and was *vi & armis*, and because it is not the course of the writ to say *vi & armis*, therefore per tot. cur. the writ shall abate, and cannot be amended. Br. Amendment, pl. 11. cites 34 H. 6. 26.

4. Debt against *N. Wickes late of Bristol, &c.* The defendant said, that the day of the writ purchased he was abiding at *D. absque hoc* that he was ever abiding at the aforesaid vill of Bristol, and it was found for the defendant, and they were compelled to replead, because the writ was *Bristol*, and not *vill of Bristol*, and by reason of this word of surplusage (*Vill*) they repleaded; quod nota. Br. Repleader, pl. 6. cites 34 H. 6. 19.

Br. Error, pl. 21. cites 35 H. 6. 12. 13.

5. *Prisot* caused him who sued writ of error returnable 15 Hill to make it more short, viz. *Quindena Martini*, because the plaintiff who recovered should not be long delayed; quod nota in C. B. viz. another court. Br. Amendment, pl. 13. cites 35 H. 6. 13.

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So where one recovers against J. S. and after J. S. and T. N. brings writ of error;

6. *J. S. recovered*, and after *J. S. and T. N. brought scire facias* to execute the same recovery, and it was amended per judicium. Br. Amendment, pl. 77. cites 22 E. 4. 6.

Br. Amendment, pl. 77. cites 22 E. 4. 6.

7. Debt was brought in the *debet & detinet*, and after the plaintiff counted of a debt due to him as executor to *J. S.* and therefore it ought to be *detinet* only without *debet*, and the writ was abated, and not amended per judicium. Br. Amendment, pl. 78. cites 22 E. 4. 20.

For it was agreed, that where one in the commencement of a plea or title intitles himself by

8. Error, because in *assise* the tenant intituled himself to the moiety by the dying seised of Robert his father, and to the other moiety by gift in tail to Raufe his father, whose heir, &c. and it was assigned for error, that he had 2 names, [*Robert and Raufe*] and by the best opinion it shall be amended, quod *Fineux concessit*. Br. Amendment, pl. 43. cites 14 H. 7. 11.

*N. T.* his father, and after in the same plea says *prædictus J. T. &c.* this shall be amended, because it appears in the commencement what his name was. Br. Amendment, pl. 43. cites 14 H. 7. 11.

So where it is in several pleas, quære. Ibid.

9. *Scire facias* upon a recognizance to shew cause quare the plaintiff should not have execution de *prædictis* mille libris recognitis juxta formam recuperationis, instead of recognitionis *prædictis*; and it was held on demurrer, that the words (*juxta formam recuperationis*) was surplusage, and the record was amended. 3 Mod. 251. Mich. 4 Jac. B. R. Ayres v. Huntington.

(R. a) What shall be said to be the Default of the Clerk, Sheriff, &c.

See (B) pl.  
13, 15, 16.  
19, 28, 30.  
35, 36. (E)  
12 (O. 2) 5.

1. **I**F trespass be brought of breaking his close, trampling his grass, and carrying away his goods, and in the count the carrying away of the goods is left out, the count shall not be amended; for this is not properly the misprision of the clerk, and therefore shall not be amended in another term; for the plaintiff may count as he will at his peril, and if it be ill it shall not be amended; contrary it may be ex gratia curiæ in the same term; note the diversity, and this before that the court records it. Br. Amendment, pl. 41. cites 22 H. 6. 58.

2. In debt the defendant pleaded release and so to issue, and did not say, *Et hoc paratus est verificare*, as he ought to have said upon plea in the affirmative, as here, and the defendant prayed that it be amended, and it was \* not; for this is the default of the party or his counsel, and not of the clerk, and therefore it is not warranted by the statute. Br. Amendment, pl. 7. cites 27 H. 6. 10.

\* Br. Amendment, pl. 103. cites S. C. for it is a matter of substance.

3. *Essoign* was *Michel* where the writ was *Michyel*, and it was not amended, for this is not misprision of the clerk; for this shall be cast before the writ comes in. Br. Amendment, pl. 86. cites 30 H. 6. 1.

Otherwise it seems where it is cast after issue joined, or the court is seised of

a record. Ibid.—Br. Essoign, pl. 143. cites S. C.

4. *Petition* was sued in the name of *Abbot and Covent*, which is in lieu of action, and no action can be sued in the name of the *Covent*. And it was held not misprision of the clerk, and that it shall not be amended. Br. Amendment, pl. 65. cites L. 5 E. 4. 38.

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5. At issue, *venire facias* issued, and after sicut alias & pluries, and where it should be *Quod præceptum est vic' quod venire facias sicut alias duodecim, &c.* at such a day ad recogn. &c. quia tam, &c. it was *præceptum est vic' sicut alias quod capiuntur, &c.* ad recogn. &c. And it was amended, for it is only misprision of the clerk. Br. Amendment, pl. 66. cites 5 E. 4. 140.

6. In annuity, the writ was *præcipe quod reddat 10l. 6s. 8d.* and the count was 10l. only, and the 6s. 8d. omitted, and the plaintiff recovered, and it was reversed, because it is not warranted by the writ, and was not a mistake; for the count is by the party and not by the clerk, and therefore the judgment was reversed; quod nota. Br. Amendment, pl. 49. cites 9 E. 4. 51.

Br. Annuity, pl. 24. cites S. C.

7. *Assise* by J. S. and W. N. the defendant pleaded that T. N. died after the last continuance where it should be W. N. And the best opinion was that it shall not be amended; for the statute was made in favour of clerks and officers, so that misprision of the clerk shall be amended; but e contra of plea of the party, for this is done by himself or his counsellor, and is no default of the clerk. Br. Amendment, pl. 74. cites 18 E. 4. 13 & 20 E. 4. 6.

8. A man in assise made bar and gave colour that J. S. entered, upon whom the *plaintiff entered*, &c. where it *should be that the defendant entered*, and adjudged misprision, and was amended per judicium. Br. Amendment, pl. 113. cites 11 H. 7. 26.

9. In *debt upon a recovery had in assise*, the *date of the writ of assise was not put in the writ*, and it was held that it should be amended; for the clerk had the record for his instruction. Thel. Dig. 225. lib. 16. cap. 6. f. 26. cites Pasch. 13 H. 7. 21. but adds, *quære* what manner of writ of debt this was.

Thel. Dig. 225. lib. 16. cap. 6. f. 27. cites S. C. says it was held by the greater opinion of the court, and by Brian that the writ should be amended; but adds *quære*.  
10. *Annuity granted by the master and confreres*, the writ was *against master only*, and because the clerk of the Chancery had the deed of annuity in his hands, therefore by the best opinion it shall be amended; *quod nota*. Br. Amendment, pl. 44. cites 14 A. 7. 13.

11. *Exigent* was returned *that one county was held at Oxon*, and *did not shew in what county Oxon was*, nor where the other counties were held, &c. And per Tremain, the outlawry is good. And per cur. such default at the exigent, nor after, shall not be said misprision, and therefore shall not be amended. Br. Amendment, pl. 54. cites 21 H. 7. 34.

Jo. 199. pl. 14. S. C. says that Hide Ch. J. at the first was of opinion with Whitlock and Crooke, that it should be amended, but that afterwards he doubted; but it was amended by consent.—Win. 20. Trin. 19 Jac. C. B. Anon. S. P. exactly, and seems to be S. C. and Hobart and Winch said, it should not be amended, for it is matter of substance, but because the clerk that made this misprision was a good clerk, day was given over, &c.  
12. *Debt against an heir upon a bond of his father*, the plaintiff in setting forth the bond in his *declaration* had *omitted* these words, *Et ad eandem solutionem obligo me et hæredes meos*: this being moved in arrest of judgment, it was held by Croke and Whitlock J. against Jones, that it was amendable, it being merely the default of the clerk who had the obligation before him, and instructions, as he confessed, to draw it against the defendant as heir. Hide Ch. J. inclined likewise to this opinion, but it was appointed to be amended by consent. Cro. C. 147. pl. 2. Hill. 4 Car. B. R. Forger v. Sales.

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See (F) pl. 22, and the notes there.

(S. a) Rased, Obliterated, &c. Records, amended.

The Reporter adds a nota, that all the parchment remained intire and not diminished; for if so, then it had been

1. *O* *Riginal writ* whereupon a common recovery of several manors, by *casualty of water and other ill keeping was so defaced that some words could not be read at all*, and only part of others, and which was in the names of the manors, but in the roll and in the *habere facias seisinam the manors and all particulars appeared certainly*; it was held that the original writ is amendable by the *stat.* 8 H. 6. And. 79. 80. pl. 67. Trin. 24 Eliz. the \* Earl of Arundel v. Ld. Lumly.

otherwise, as was before held in Sir John Throgmorton's case.

\* S. C. cited 8 Rep. 160. a. to have been adjudged by all the judges of England, *una voce*, and the rather because it was a common recovery.



2. If the original or other part of the record be stole, taken away, withdrawn or avoided by any clerk, though this be felony per 8 H. 6. cap. 12. yet this may be supplied, and amended by the other parts of the record; but if such part stole, &c. or obliterated cannot be supplied by the record, nor by any exemplification made of the record, then it cannot be amended. 8 Rep. 160. a. b. cites it as resolved by all the judges of England, Trin. 24 Eliz. in the case of the Earl of Arundel v. Lord Lumly.

3. By accident some *ink had fallen on a roll* remaining in the treasury, and on motion to amend the same, the clerk, under-clerks, and treasury-keeper were examined, and it appearing to be a mere accident the court ordered the roll in the treasury to be *amended by the nisi prius roll and postea*. Rep. of Pract. in C. B. 3. Hill. 10 Ann. Thornhill v. Lomax.

(T. a) Defects in *Indictments and Criminal Cases, or other Cases where the King is Party*, amended.

1. **M**isrecital of a statute *in matter, or in year, day, or place*, may be amended in the case of the king, and this in another term; contra of a common person, for every one that meddles with it ought to shew the law truly. Br. Parliament, pl. 87. cites 33 H. 8.

Note it was agreed by the learned counsel of the king, that the king may

*amend his declaration in another term in omission, &c. but he cannot alter the matter and change it wholly.* As where information mis-recites the statute it may be amended, because mis-recital is the cause of demurrer; for if it be mis-recited then there is no such statute. Br. Amendment, pl. 80. cites 30 H. 8.

H. was indicted and found guilty of a *misdemeanor in altering an assessment*, which he with the other commissioners signed in pursuance of the *Land-tax act*, which was enacted at a sessions of parliament held in Nov. 4 Ann. Exception was taken that in the indictment the act was not well set forth; for though the *writs* of parliament were *returnable the 14th of June*, the time mentioned in the indictment, and right according to the printed book, yet being *prorogued till October*, the sessions did not commence till then, whereupon the indictment was quashed. 11 Mod. 113. Pasch. 6 Ann. B. R. the Queen v. Hickerlingill.

2. T. was indicted upon the statute of 8 H. 6. in this manner, *Inquisitio capt. apud Surfleet coram A. & B. justic. pacis, &c. in partibus prædict. per sacramentum, &c.* Exception was taken because it did not appear that *Surfleet, where the inquisition was taken, was in partibus Hollandiæ*, and if it was not, the inquisition was taken without authority. For the county of Lincoln hath three divisions, and three several commissions of peace, so as the one hath not to do with the other; at length the court agreed that the indictment be discharged if the record with the clerk of the peace was so; but if upon view of the record they should find it to be a misprision in the certificate, then they should cause it to be amended. Cro. J. 276. pl. 6. Pasch. 9 Jac. B. R. Thorney's case.

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3. *Two were indicted for felony in case of life, and found guilty, and this was in the singular number.* By the opinion of 8 or 9 judges, the indictment was held clearly good and well amendable, which was done, and the criminals were afterwards hanged for the

S. C. cited by Gould J. 2 Ld Raym. Rep. 1061.

the felony. Cited by Yelverton J. 2 Bulst. 35 Mich. 10 Jac. as a case that happened at the assises before him about 2 years before.

Upon a *habeas corpus* to the lieutenant of the Tower of London, he made an insufficient return. The court ordered that

he should amend his return, or else they would grant an alias with a pain. Sty. 96. Pasch. 24 Car. B. R. Lilborn's case.

4. Dr. Alphonso was committed by the college of physicians for practising physick, &c. and upon *habeas corpus* the return was held insufficient, because it did not set forth the cause of his commitment in particular, and the court would not suffer them to amend the return, but bailed the prisoner; the rather, because if they discharged him he would be immediately committed again, and then they would amend the return. 2 Bulst. 259. Mich. 12 Jac. Dr. Alphonso v. the College of Physicians.

5. D. was indicted at the assises for a nuisance, and traversed the indictment; but in the joining of the issue, the word (*Similiter*) after the words (*Et de hoc ponit se super patriam & prædictus*) was omitted. All the justices held that the verdict having passed for the king, the clerk of assise should come into court and amend it; for otherwise infinite indictments should be avoided by negligence of the clerk. 2 Roll. Rep. 59. Hill. 16 Jac. B. R. Delbridge's case.

S. C. cited 2 Ld. Raym. Rep. 1068. by Powel J. who said the reason of it was, because it was looked upon to be a thing of course; but he said he cannot come up to it.

6. In indictment for erecting a nuisance, the defendant pleaded Not guilty, and found against him. The entry of the issue of Not guilty, which should have been by the clerk of the assises, who ought to have joined the issue, was omitted, and so the verdict was without an issue. The court held it was the default of the clerk, and ordered it should be amended by the clerk of the assise that then was, though the omission of it was by another clerk, who was removed. Cro. J. 502. pl. 12. Mich. 16 Jac. B. R. Harris's case.

S. C. cited 2 Ld. Raym. Rep. 1069. —The statutes of jeofails do not extend to *quo warranto*, nor to informations of intrusion; for the king is not bound unless he is named; per 3 justices. But Noy said that

7. In a *quo warranto* a judgment of disclaimer *virtute literarum patentium gerent. dat. 17 Jacobi*, was entered by consent; but because the words (*gerent. dat. 17 Jacobi*) were written in the margin of the Paper-book, and had a stroke drawn across them, the clerk omitted them in ingrossing the judgment. It was moved to amend it by interlining these words; but it was objected that it could not be amended, being in another term, especially in the king's case, and that none of the statutes of amendment extend to *quo warranto*. But per tot. cur. it is amendable at common law as well in another term as the term wherein entered, and as well in the king's case as of a common person, it being only the mistake of the clerk. Cro. C. 144. pl. 22. Mich. 4 Car. Sir Humphry Tufton and Sir John Ashley's case.

peradventure it should be otherwise in case of a *quare impedit*, where the suit is betwixt the party and the king. Cro. C. 311. 312. pl. 2. Trin. 9 Car. B. R. in case of the King v. Sherington Tith-

bot. — Jo. 320. pl. 2. S. C. accordingly as to *quo warranto*. — S. C. cited, and said it seemed unreasonable to hold, that the king was not bound by the law by his not being named, because it appears by the exception that the parliament intended that he had been bound, though not named; for otherwise there would have been

no occasion for the exception. 2 Lev. 139. Trin. 27 Car. 2. B. R. The King v. Ld. Fitzwater. — 2 Keb. 242. pl. 60. Mich. 25 Car. 2. S. C. but S. P. does not appear. — S. C. cited G. Hist. of C. B. 93. and in the New Abr. 96. in the same words.

See stat. 9 Annæ, cap. 20. at ( Q. )

8. In an *information against the inhabitants of B. for not repairing a bridge, two of the defendants pleaded to issue, and verdict found for them.* It was moved that Mr. Attorney-General having *mistaken the name of one of them in his replication, the record might be amended, and so the judgment after not be erroneous; but the court said they did not see how it could be amended; for they conceived there was no issue joined.* Sty. 167. Mich. 1649. B. R.

9. A motion was made that the word (*Publicæ*) might be put into an indictment, which was removed into B. R. by certiorari; but per cur. it could not be. Sty. 321. Hill. 1651. Anon.

10. A solicitor was committed for *interlining the postea of an indictment, by inserting the word (Falsely.)* The postea was ordered to be amended by the Paper-Book. Sty. 374. Trin. 1653. Kitchingman's case.

11. The defendant was *indicted for barretry in Middlesex, and in the return of the certiorari 2 or 3 lines of the indictment were left out.* It was moved that the clerk of the peace of Middlesex might amend it by the record, which he had brought into court; but it was agreed that there is a *diversity as to this matter between London and other counties; for an indictment, &c. certified out of London, may be amended upon motion by the original, because by their charter they certify only tenorem recordi, so that the record still remains with them; but it cannot be amended in any other county, because the law supposes the record itself to be removed, and so there is nothing remaining for them to amend it by; but the Reporter makes a quære.* Sid. 155. pl. 5. Mich. 15 Car. 2. B. R. The King v. Alcock.

It was said that indictments removed out of London have been amended by the original; for they do not certify that, but only a transcript; and a jury have been re-summoned to amend an

indictment found in this court, and in the principal case where the indictment was against (Edward) all along till the conclusion, and then it was præd (Johannes,) if by examination of the clerk of the peace it appeared that the indictment certified varied from the original, it might be amended. Sed curia advisare vult. Vent. 13. Pasch. 21 Car. 2. B. R. in case of the King v. Bromley.

12. It was agreed by all, that if an *information be put in against one in the crown-office, that information may be amended before the party has pleaded; for that information is only a declaration for the king; but otherwise it is of an indictment, for that is found by a jury, therefore cannot be amended; and accordingly this term an information against the brewers of London was amended, they having not pleaded.* And so it was agreed the information against Sir Charles Sydley should be amended, if the attorney-general then thought fit. Copy of a MS. Rep. of Ld. Ch. J. Keyling. Mich. 15 Car. 2. Anon.

13. An *inquisition found that G. feloniously drowned himself, but did not say that he cast himself into the water, nor that he died so.* It was moved that the coroner should attend to amend the inquisition. Per cur. All matters of form may be amended in the office by the coroners, but not matter of substance; and at length it was agreed that this shall be amended; for the feloniously drowning himself is the substance. Sid. 259. pl. 6. Trin. 17 Car. 2. B. R. The King v. Glover.

If an inquisition of murder be without the word (*mar- dravit*) it may be amended; per Twifden J. but Keeling &

contra Sid. 259. Trin. 17 Car. 2. in pl. 6.

14. An

14. An *information of perjury* may be amended; per cur. Lev. 189. Trin. 18 Car. 2. B. R. The King v. Goffe.

Freem.  
Rep. 221.  
pl. 228.  
S. C. ac-  
cordingly  
per cur.  
but that in  
informa-  
tions at  
common  
law, the  
court may  
grant amendment.

15. Debt *Qui tam, &c.* for 100l. against a justice of peace, for refusing to grant his warrant to suppress a seditious conventicle. *After issue joined, and the cause set down to be tried at the nisi prius,* the plaintiff moved to amend a word in his declaration, which laid the conventicle to be at the defendant's mansion-house, when in truth it was not, but was at a little distance from it. But per Ch. J. *after issue joined, &c. and this being on a penal statute,* no precedent can be shewn for an amendment in such case. 2 Mod. 144. Hill. 28 & 29 Car. 2. C. B. Sir William Turner's case.

Sid. 175. pl.  
7. Hill. 15.  
& 16 Car. 2.

16. The *caption of an indictment* may be amended the *same term* it comes into court. Vent. 344. Mich. 31 Car. 2. B. R. in a nota.

B. R. The King v. Love, S. P. but not in another term.—Saund. 249. Pasch. 21 Car. 2. B. R. Faulkner's case, S. P. accordingly.—North Ch. J. said there could be no amendment of an indictment, because it was found by the oaths of 12 men. Freem. Rep. 221. pl. 228. Hill. 1676.

S. P. held accordingly, 2 Ld. Raym. Rep. 968. Trin. 2 Ann. Anon.

Comb. 73.  
The King  
v. Hock-  
nall, S. C.

17. An *information* was exhibited against the defendant at Michaelmas sessions *for a riot*, and the fact laid to be in January following. It is not only amendable at common law, but by several statutes, which extend to misprisions of clerks, except treason, felony, and outlawry, and so the mistake, which was Quindenam Martini, was amended, and made Quindenam Hillarii. 3 Mod. 167. Hill. 3 Jac. 2. B. R. The King v. Hockenhul.

3 Lev. 375.  
Mich. 5 W.  
& M. in  
C. B. S. P.  
according-  
ly, and  
therefore  
it is cured  
by the ver-  
dict, Sedg-  
wick *Qui*  
*tam, &c. v.*  
Richardson.  
—So in  
an action

18. Though true it is that the statute of 8 H. 6. cap. 12. *excepts appeals, indictments of treason or felony and outlawries for the same,* and that the stat. 32 H. 8. *aids only in actions or suits at common law,* and 18 Eliz. 14. *extends not to actions or informations on any popular or penal statute,* and therefore every criminal prosecution is out of the statute of jeofails; yet *actions remedial, though founded upon penal statutes,* have been allowed the benefit of those statutes; and therefore in an action *Qui tam, &c.* upon 31 Eliz. *for selling horses in Smithfield not tolled,* it was said, that a discontinuance shall be aided by 32 H. 8. 30. Arg. Comyns's Rep. 284. cites 3 Lev. 375.

*qui tam, &c.* upon the statute of usury it was allowed by Holt Ch. J. that the information by the party grieved shall be within those statutes, though *not common informations*, Arg. Comyns's Rep. 284. cites 1 Salk. 324. [325. pl. 2. Trin. 2 Ann. Wyatt v. Aland.]—In an action on a penal statute the sum was mistaken in the declaration, but leave was given to amend it, the writ being general. 12 Mod. 248. Mich. 10 W. 3. Broom v. Holford.—Holt Ch. J. seemed to hold, that an information upon a penal statute by a common informer was not within the statute of jeofails, otherwise of an information by the party grieved. 1 Salk. 325. pl. 2. Trin. 2 Ann. in case of Wyatt v. Aland.—2 Ld. Raym. Rep. 977. Wyatt v. Eyland, S. C. in an action on the statute of usury the memorandum was general of the first day of the term, but bail was not put in till the middle of the term, and the court gave leave to the plaintiff to enter up a special memorandum, for the defendant is not in court till bail filed, and this is only to make the entry according to the truth, which appears on record, and the court said, it was an amendment at the common law, and not on the statutes.

19. The defendant being *indicted for murder*, pleaded that he is *Earl of Banbury, &c.* the attorney general replied, and then the defendant moved to amend his plea, and had leave, (Holt doubting) because

because *not entered on the roll*. 1 Salk. 47. Trin. 6 W. 3. B. R. the King v. Knolles.

20. The defendant was found guilty upon an *information*, for a *libel*, and it was moved in arrest of judgment, that the *ven. fac.* was *returnable die Lunæ prox' post tres sept' Sanct' Mich'*, which was 23 Octob. but the *distringas* was *teste* 24 Octob. whereas the venire was returned the 23d. The court held this not amendable by any statute of amendment, nor at common law, because it would be to warrant a trial that was tried without any authority, and to make it contrary to the truth of the fact, and it is a mistake of the clerk in Skill. 1 Salk. 51. pl. 14. Mich. 3 Ann. B. R. the Queen v. Tutchin.

2 Ld. Raym. Rep. 1061. S. C. and Gould J. held that it was amendable at common law. Powis J.

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thought it rather a-

mendable than not. Holt Ch. J. and Powell J. held it not amendable, and thereupon (as the Reporter says) Powys, who had delivered his opinion with great dubiousness, and concluded it as mentioned above, came over to Holt and Powell, and held it not amendable, because, as he said, it should not go upon a court divided. And see there the arguments of the judges much at large. —S. C. cited G. Hist. of C. B. 94. and New Abr. 96. in the same words.

22. An indictment wanted the words *in com'* and upon motion the court would not amend it, but *secus* upon an information. Note, it is matter of substance. 12 Mod. 229. King v. Lewis.

23. The court were of opinion, that the entry of a *special verdict*, though *in a criminal prosecution*, may be amended, if it was *not entered according to the notes* taken, and the roll may be amended. Gould cited Raym. 460. and said, the court frequently amended informations; quære if the court would amend in a case where they had not the minutes there. Per cur. if the *notes and the verdict vary*, the court will amend according to the notes, else not. 11 Mod. 84. pl. 2. Trin. 5 Ann. B. R. Anon.

And if a jury find for the queen, and the verdict is entered for the defendant, yet at common law it is amendable;

per cur. and says it was agreed in Dr. Drake's case. 11 Mod. 84. pl. 2. Trin. 5 Ann. B. R. Anon. —If in a special verdict the clerk takes the minutes right, and the verdict is entered up wrong, the court will amend the roll according to the minutes, though in a criminal prosecution. 11 Mod. 84. pl. 2. Trin. 5 Ann. B. R. Anon.

24. An *information* for a challenge by the defendant was by a *wrong addition*, but it was ruled to be amended on payment of costs, this being a suit not carried on by the crown. 2 Ld. Raym. Rep. 1472. Hill. 13 Geo. 1. the King v. Seagood.

25. A bond was forged in which the pretended obligor was mentioned to be of L. in Peroch. (instead of Paroch.) de S. in com, M. and the offender being indicted, the nisi prius roll of the indictment was (Paroch.) but after verdict upon motion and argument it was amended by the record, and made (Peroch.) agreeable to the forged bond which was produced in evidence. 2 Ld. Raym. Rep. 1518. Pasch. 1 Geo. 2. B. R. the King v. Hayes.

Barnard Rep. in B. R. 31. S. C.

26. Anciently where an indictment appeared to be *insufficient*, the practice was not to put the defendant to answer it, but if it were found in the county in which the court sat, to award process against the grand jury, to come into court and amend it, and it is common practice at this day, while the grand jury which found a bill is before the court, to amend it by their consent in matter of form, as the name or addition of the party, &c. 2 Hawk. Pl. C. 245. cap. 25. § 100.

27. Clearly



L. P. R. 45.  
cites Pasch.  
24 Car. B. R.  
for though  
the law will  
give way as  
much as is  
requisite for  
the main-  
taining of  
indict-  
ments, be-  
cause it is  
intended  
they are  
preferred  
pro hono-  
publico, yet  
it will not  
permit that  
the party  
indicted

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shall be un-  
necessarily  
delayed by  
the prose-  
cutor from  
coming to  
a just vindi-

cation of himself for the crime for which he stands indicted.—In all the statutes of amendments from 8 H. 6. there is an exception for appeals, indictment of high treason, and of felonies. It has been a great question, whether any of these statutes extend to the case of the king, or either to remedy the parties where the party has proceeded against the king, or the king against the parties; and in both cases it has been ruled, that these statutes do not extend to the king; for there only indictments, appeals, and informations on penal statutes are mentioned, yet because the first says it shall be amended on the challenge of the party, in which the king with decency cannot be included, the subsequent statutes are supposed to be made on the same platform, and this exception is only *ex abundanti cautela*. G. Hist. of C. B. 93.

27. Clearly none of the *statutes of amendments* extend to criminal prosecutions, and therefore no indictment can be amended in *any case wherein an amendment is not allowable by the common law*; but it is said that the body of an indictment from London may be amended, because by the city charter *the tenour of the record only shall be removed* from thence. Also a coroner may by rule amend his inquest by the notes in matter of form before it is filed; and the caption of an indictment may on motion be amended by the clerk of the assises, or of the peace, so as to make it agree with the original record, at any time during the term in which it came in, but not in a subsequent term. But it is said, that the caption of an inquisition shall never be amended after it is filed; for being part of, and drawn at the same time with the inquisition, greater exactness is required in it than in the caption of an indictment, which is left as of course to be drawn up as occasion shall require. Also it seems to be settled, that a *discontinuance in a criminal prosecution* is not amendable without consent, but it seems, that the mere *misperison in the joining of an issue*, as where the *similiter*, &c. is omitted, is amendable at any time. Also the direction of a *venire vicecomitibus* of B. which is returned by J. S. vicecomite, may be amended by the oath of J. S. that there is but one sheriff of B. which is himself; also it is common practice to amend criminal informations, and the pleadings thereon, while all is on paper. 2 Hawk. Pl. C. Abr. 224. cap. 25. s. 62. but in the fol. edit. 244. s. 99.

## (U. a) Jeofails. Aided by Verdict. In what Cases in General; and why.

1. *M*istrials are not helped by the statute of jeofails. Agreed by court and counsel. Goldsb. 38. pl. 12. Mich. 29 Eliz. Knight's case.

S. P. Arg.  
10 Mod.  
229. cites  
Hutt. 24.  
and 2 Jo.  
132. and

2. A verdict helps every thing which is necessary to be proved upon the trial, and without proof of which no verdict could be given for the plaintiff. Carth. 389. Mich. 8 W. 3. B. R. Arg. in case of Blackall v. Eale.

Raym. 487. and Lev. 308.—S. P. Arg. 12 Mod. 510. in case of Palmer v. Stavelly.

3. A verdict does not make the declaration better in any case, but where the plaintiff is to give the matter in evidence and want of such matter in the declaration is aided; per Holt Ch. J. Holt's Rep.



Rep. 567, pl. 46. Mich. 5 Ann. in case of Willet v. Waxcomb.

4. The general *reason why* defects in pleadings are cured by verdict is, because it is to be supposed that the verdict could not have been found unless there had been evidence given at the trial of that matter wherein the pleading is defective. Arg. 10 Mod. 300. in case of Muston and Yateman.

(W. a) Omissions in Declarations aided by Verdict. In what Cases.

1. *DEBT* against J. S. of the city of York, he appeared and pleaded to issue, which passed against him, and he pleaded in arrest of judgment, that he had not sufficient addition according to the statute; for he may be of the city of York and abiding in L. where the statute 1 H. 5. cap. 5. is, that he shall be named of the vill where he abides, in action where process of outlawry lies; for the statute is that the writ shall abate by exception of the party, which is intended by plea, and now he did not plead this in abatement of the writ at first, and so has lost the advantage. Br. Repleader, pl. 60. cites 35 H. 6. 12.

2. In *assumpsit* no place was set forth where the promise was made. After verdict upon non assumpsit it was moved in arrest of judgment, that this was a mis-trial; because there was *no place laid*, &c. The court held that this is helped by the verdict. Goldsb. 47. pl. 5. Pasch. 29 Eliz. Anon.

3. After verdict defendant shall not take *advantage of uncertainty in the declaration* if there be any *convenient certainty*, but where there is no certainty it is otherwise. Cro. E. 817. pl. 11. Pasch. 43 Eliz. B. R. in case of Wood v. Smith.

4. The declaration was of a grant of land in *Sutton Coe-field*, but the deed was of land in *Sutton Parva infra dominium de Sutton in Coe-field*. Yet this is aided by the finding of the jury, who found expressly that the grantor *dedit tenementa infra scripta*, so that being so *expressly found*, the deed is not material. Quod nota. Yelv. 101. Pasch. 5 Jac. B. R. Ward v. Walthew.

by S. C. accordingly, but seems to be only a translation of Yelv.——Mo. 683. pl. 943. Ward v. Sudman S. C. but S. P. does not appear.

5. If issue be joined upon a *grant of a reversion* where it is not alleged that it was by deed, or that the tenant attorned, yet if it be found it shall be good. Hutt. 54. Mich. 20 Jac. in case of Lightfoot v. Brightman.

6. In avowry for a *rent-charge*, where the *grant thereof is not pleaded by deed*, and issue is joined upon Non concessit, if it be found *quod concessit*, it is good by the verdict. Winch. 54. in case of Lightfoot v. Brightman.

22 & 23 Car. 2. in B. R. in case of Mannington v. Guillims S. C. which was in replevin, and the defendant avowed for a rent-charge, and set forth that J. S. was seised of the rent, and bargained and sold it to the avowant, and upon issue non concessit, it was found for the avowant. And though

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Cro. J. 173. pl. 15. S. C. adjudged accordingly.——Brownl. 137. Ward v. Willings-

S. C. cited per cur. Vent. 109 in case of Monnington v. Williams.——S. C. cited per cur. Lev. 308. 309. Hill.

though it was moved that no consideration was alleged of the grant, yet this shall be intended to be proved on the trial, otherwise it could not be found for him; and the avowant had judgment.

7. In replevin, the defendant *avowed for rent granted to his father in fee*, but did *not allege that it became arrear after his father's death*. The court agreed, and resolved that it was good after verdict, it being *pleaded that it was arrear and not paid to him*, ergo it was due to him; and though it might have been more fully pleaded, yet after verdict it is sufficient. Hutt. 55. Mich. 20 Jac. Chittle v. Sammon.

8. The plaintiff declared that he *prosecuted a capias against C. &c. which he delivered to the sheriff at N. who adtunc & ibidem potuisset arrestare* the defendant, but contriving to delay the plaintiff *adtunc & ibidem recusavit arrestare, &c.* It was moved after verdict that (potuisset) signified only a possibility to arrest, and that might be if C. was within the county; and that he ought to have *shewed how, viz. that C. was in the view or presence of the sheriff*. But per tot. cur. after verdict the declaration is good enough, and it shall be *intended that* evidence was given at the trial that the sheriff might have arrested C. if he had not *voluntarily neglected doing his office*, and the word (Recusavit) implies that he had an opportunity, and judgment for the plaintiff; but they agreed that this was good cause of demurrer. 2 Jo. 40. Hill. 25 & 26 Car. 2. C. B. Fish v. Aston.

9. An *assumpsit* was brought upon a promise *to pay money to two, or either of them*, and declared that it was *not paid to the two, and not said, or either of them*, yet it was adjudged good after verdict. Cited by the Ch. Just. Vent. 119. Pasch. 23 Car. 2. B. R.

S. C. cited  
Carth. 389.  
as adjudged  
according-

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ly, and held  
that where  
an impossible

day, as a day not yet come, was laid in the declaration in an action of battery, it was cured by the verdict. Carth. 389. Blackall v. Eale.——12 Mod. 102. Blackhall v. Eccles S. C. and per cur. the day alleged not being yet come, is no day at all; and judgment for the plaintiff.——5 Mod. 286. S. C. adjudged for the plaintiff.——3 Salk. 8. Blackall v. Evans S. C.——Comyns's Rep. 12. S. C. adjudged for the plaintiff.

In any case  
where any  
thing is o-  
mitted in a  
declaration,  
though it be

11. Wheresoever it may be *presumed that any thing must of necessity be given in evidence*, the want of mentioning it in the record will not vitiate it after a verdict. Per cur. Raym. 487. Hill. 34 & 35 Car. 2. B. R. in case of Hitchins v. Stevens. *matter of substance* if it be such as without proving it at the trial the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such omission shall not arrest the judgment. 2 Show. 234. pl. 230. says this rule was taken and agreed by all the court Mich. 34 Car. 2. in case of Hitchins v. Stevens.——As where *bargainee of a reversion brought debt for rent, and alleged attornment*, and upon *Nil debet pleaded*, a verdict was for the plaintiff. It was moved that the plaintiff had set forth no title to the rent, because without attornment he had none; and cited Lat. 14 the King v. Somerland, and Hob. [72. pl. 87.] Hope [Pope] v. Skinner, yet the court upon the rule above, after solemn debate, gave judgment for the plaintiff. 2 Show. 333. pl. 230. Mich.

34 Car.

24 Car. 2. B. R. *Hitchins v. Stevens*.—Raym. 487. S. C. adjudged accordingly.—2 Jo. 217. 232. S. C. adjudged accordingly.

The plaintiff as assignee of a reversion for years expectant on a lease for years whereon a rent was reserved, brought an action of covenant against the defendant tenant for years, for not repairing the houses demised, and had an interlocutory judgment by default. It was moved in arrest of judgment, because the plaintiff had not alleged an attornment of the tenant upon the assignment of the reversion. But it was answered, that there was no need of an attornment since the 32 H. 8. cap. 34. for that statute has given assignees of reversions the like advantage for breach of covenants as their grantors had, and that the plaintiff in this case was assignee before attornment, and that an action of covenant had been held maintainable by the grantee of a reversion of copyhold, though in such case there be no attornment. Besides, though attornment ought to have been alleged, that defect was cured by the 4 Ann. cap. 16. which has put judgments upon default upon the same footing with cases after verdict; in which case this defect would have been cured. But the court held that nothing passed by the assignment before the attornment of the tenant, and that the 32 H. 8. has given grantees and assignees of reversions a power to take advantage of covenants, but hath not made any person a grantee or assignee which was not so before the statute, and therefore to take advantage of that statute, a man must be a compleat assignee according to 1 Inst. 215. a. And Eyre Just. cited the case of *PLAYER AND ROBERTS* in Sir W. Jones's Rep. 243. and a case in Sir T. Jones, where this case had been adjudged. As to the cases of copyholds, they held that the grantee had the reversion vested in him without attornment, and that it has put cases wherein judgments are given for default upon the same foot with cases after verdict, as to the jeofails only, but that the omissions in this case is not a jeofail, for which reasons, per tot. cur. judgment was arrested. 2 MS. Rep. Hill. 4 Geo. 1. in B. R. *Vandiput v. Thorpe*.

N. B. The Ch. J. said, that if the assignee had brought an action for rent without alleging attornment, and upon Nil debet pleaded a verdict was given for him, the attornment shall be supposed, because he could not prove the rent due without giving the attornment in evidence. Ibid.

12. In *trespass* the writ was, *Quare clausum fregit & herbam, &c. conculcavit, &c.* and the declaration was, *Quare clausum (omitting, fregit) & herbam, &c.* The plaintiff had a verdict, but judgment was arrested, because (*clausum fregit*) was not in the declaration; and if the writ contains more than is declared for, this is a variance not aided by a verdict; but Ventris J. held, that treading and consuming the grass necessarily implied a breach of the close, for that there could not be an entry without a breach. 2 Vent. 153. Pasch. 2 W. & M. in C. B. *Ellis v. Yates*.

13. Though a demurrer may be to a declaration on a promise on a special agreement, which sets forth a breach generally, and not any particular instance of the breach of it, yet after a verdict it shall be intended that some particular breach was given in evidence to the jury, otherwise the plaintiff could not have recovered a verdict. Carth. 271. Pasch. 5 W. 3. in B. R.

14. *Trespass* was only laid to be *diversis diebus & vicibus*, without laying any particular time. Per cur. it is well enough after verdict. 12 Mod. 105. Mich. 8 W. 3. *Wall and Dukes*.

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S. C. cited as held accordingly. Comyn's Rep. 13.

15. In an action upon the case, upon the general custom of the realm, and also a special action for negligently keeping his fire in which the plaintiff counts, that he was possessed of a close of heath, and the defendant of another contigue adjacent and that he had kindled a fire in this close, the which tam improvide & negligenter servavit, that it burnt the close, and after a verdict it was moved in arrest of judgment, that it does not appear in this case to be done by the command of the master, and then it being out of his house he is not responsible, and cited 2 H. 4. 24. for if the servant does it without the command of his master, it is not the negligence of the master; but it was answered, that it being after a verdict, be-

1 Salk. 13. pl. 4. S. C. Judgment for the plaintiff, but no mention is made of the servant.—Comb. 459. S. C. says nothing of servant, adjournatur.—Carth. 413.

S. C. says nothing of servant, but judgment for the plaintiff.—  
12 Mod.

it by negligence or misfortune, it is all one; for now they are upon the record, and it may be *his fire in a field* as well as in a house, and it was matter of evidence if it be his fire or not. It was adjudged pro quer'. Skin. 681. pl. 1. Mich. 9 W. 3. B. R. Turbervill v. Stamp.

151. S. C. adjudged for the plaintiff, but no mention of the servant. — Ld. Raym. Rep. 264. S. C. says the fire in fact was kindled by the servant, [but no notice of this being moved in arrest of judgment] and judgment for the plaintiff. And Holt Ch. J. said, that if the servant kindled the fire by way of husbandry, and proper for his employment, though he had no express command from his master, yet the master shall be liable for damage done by the fire; for it shall be intended that the servant had authority from his master, it being for his master's benefit. — Comyns's Rep. 32. pl. 22. S. C. adjudged for the plaintiff.

16. A. promises to pay B. money, and if B. died within age of 18, to pay it to his executor, executor brings the action, and avers that there was no payment to him, without saying any thing of his testator, and yet cured by verdict; per cur. 12 Mod. 422. Mich. 12 W. 3.

See Actions  
(P.c) pl. 26.

17. In action for *falsely and maliciously indicting* it is no good declaration without saying that it was without probable cause, and that the plaintiff was acquitted, or an Ignoramus returned; and yet this fault was helped by verdict; per cur. 12 Mod. 422. Mich. 12 W. 3.

12 Mod.  
537. Trin.  
13 W. 3.  
S. C. but  
S. P. does  
not appear.  
— Ld.  
Raym. Rep.  
680. S. C.  
but S. P.  
does not  
appear.

18. In *assumpsit* the plaintiff declared, that in consideration that he had delivered to the defendant a chariot, and had agreed to permit him to have the use of it for one year, the defendant promised to pay 200l. but it was not alleged that the defendant had the use of the chariot for a year; and this after a verdict for the plaintiff was moved in arrest of judgment. Sed non allocatur; for after a verdict it shall be intended that he had the use of it for a year, as it appears that the chariot was delivered to him. Comyns's Rep. 116. pl. 80. Pasch. 13 W. 3. B. R. May v. King.

18. Want of attornment in debt for rent by the assignee of the reversion, is aided by verdict; per cur. obiter. 2 Ld. Raym. Rep. 811. Mich. 1 Ann.

Arg. 10  
Mod. 202.  
cites Hob.  
116. 117.  
and Palm.  
420. and  
Lat. 110.

19. Though a title which cannot be good can never be aided by a verdict, yet a title in a declaration, which is only imperfectly set forth, and where the want of something omitted may be supplied by intendment, is cured by verdict. 1 Salk. 365. pl. 5. Hill. 4 Ann. Crowther v. Oldfield.

As where a count was of a copyhold estate, without saying *Ad voluntatem domini*, and this was held well after a verdict, because the lands were alleged and found to be parcel of the manor, and thus by custom the plaintiff as tenant customarius had common, which would not be unless it was copyhold. 1 Salk. 364. pl. 5. Hill. 4 Ann. B. R. Crowther v. Oldfield.

So where termor for years prescribed for a way by a que estate time out of mind, and that the defendant obstructed it, and had a verdict. The count set forth also a *terminus ad quem*, but no *terminus a quo* the way did lead. It was held upon a motion in arrest of judgment, that this last defect was cured by the verdict; but that the first was incurable, and so judgment arrested. Carth. 432. Mich. 9 W. 3. B. R. Dawney v. Cashford. — 1 Salk. 363. pl. 2. Dorne v. Cashford, S. C. accordingly. — S. C. admitted by the court, and said that though the plaintiff in

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possessory actions may declare upon his possession without setting out a title, yet if he undertakes to set out a title, and shows a bad one, though he need not have shown any, the verdict cannot cure it. 1 Salk. 365. in case of Crowther v. Oldfield.

21. If the jury finds a title where none appears in the declaration, it will be hard to help this case by the verdict; per Holt Ch. J. & adjournatur.

adjournatur. See 11 Mod. 179. 180. Trin. 7 Ann. B. R. Willet v. Boscomb.

22. In *case* the plaintiff declares that he was possessed of a farm and a river, *apud D. in com' Devon*, and the defendant, to damage the plaintiff's farm and river, did at a place *vocat' Davys's close in com' Dorset*, dig two ditches, and diverted the plaintiff's water out of the rivers, and damaged the meadows, but does not say *per quod*. It was objected in arrest of judgment, that this declaration was ill, not shewing that the diverting of the water was consequential of the digging the ditches, which is the jet or gist of the action; so that this is no more than trespass. But the court were of opinion, that after verdict it shall be intended that it was proved to be consequential. 11 Mod. 257. pl. 12. Mich. 8 Ann. B. R. Leveridge v. Hoskins.

23. Where a *special request in an assumpsit* should be alleged, and is not, it is fatal on demurrer, but helped after verdict. 12 Mod. 44. Masters and Marriot.

### (X. a) Want of Averment aided by Verdict.

1. **I**N trespass *issue was on a prescription for common of pasture in &c. for all his sheep levant and couchant, in and upon the demesne lands of W. which lie and are in A. aforesaid, every year.* Exception was taken for the uncertainty, because it did not appear that those were demesne lands which lie in A. For it was ill pleaded, and ought to be averred; but it being after a verdict was held good, and judgment for the plaintiff. Brownl. 232. Hill: 9 Jac. Duncomb v. Randall.

2. In ejectment the declaration was upon a lease for 3 years; if the feme of the plaintiff should so long live, and hath not shewn that the feme is yet alive. After verdict this was moved in arrest, and the common difference taken 10 E. 4. &c. where the declaration is in action, in which damages only shall be recovered, there it is not requisite to shew the life of cesty que vie; but where the term is also to be recovered, there a continuance of the estate ought to be shewn. Sed tota curia contra, because this being after verdict, is made good by the statute 21 Jac. cap. . . . of amendments, if cesty que vie be yet alive, the which we may examine by the sheriff, &c. Sid. 61. pl. 30. Mich. 13 Car. 2. B. R. Anon.

Keb. 170.  
pl. 137.  
Tubb v.  
Wallwin:  
S. P. held  
according-  
ly; and  
seems to  
be S. C.

3. Debt upon an obligation conditioned to pay the plaintiff on his marriage, or, &c. Although his marriage was not alleged to be *tempore brevis*, and so might be after the action commenced, yet after verdict it shall be intended to refer to the time of the writ. Lev. 41. Trin. 13 Car. 2. B. R. Basset v. Morgan.

4. In trespass the defendant justifies by reason of common, in the place where, for cattle levant and couchant, and does not aver the beasts were levant and couchant, this is aided after a verdict. Vent. 34. Trin. 21 Car. 2. B. R. Anon.



5. In debt against an executor it was averred, that the executor did not pay it, sed adhuc injuste detinet; but did not aver that the testator had not paid in his life-time, this was said per cur. to have been held aided after a verdict. Vent. 137.

6. The plaintiff declared in action sur le case, for that whereas the cattle of the defendant were impounded by A. B. that the defendant promised the plaintiff that if he would deliver them out of the pound, he would save him harmless from A. B. and then sets forth that A. B. brought a *parco fracto pro deliberatione* of the cattle, and recovered so much, and that the defendant *licet sapius requisitus* had not saved him harmless, *per quod*, &c. and verdict for the plaintiff; and it was argued that he hath not here averred that he did deliver them. Judgment was arrested; for they held the delivery of the cattle to be a material traversable point, and not holpen by verdict, and though he says he was sued in a *parco fracto pro deliberatione*, so he might, and not deliver the cattle. Skin. 141. Mich. 35 Car. 2. B. R. Anon.

3 Mod. 181.  
S. C. ad-  
judged ac-  
cordingly.

7. Action for a duty for weighing goods at the common beam in L. setting forth that the lord mayor, &c. time out of mind, kept a common beam and weights, and servants to attend, and that the defendant bought goods, but did not bring them to the beam to be weighed. After a verdict for the plaintiff it was moved, that the plaintiff had not well applied the custom to the present case, in not averring that the goods were such as were usually sold by weight, and if not, then it is no breach of the custom in the declaration; besides it was not alleged that the plaintiff had not paid the customary toll for weighing. But per 3 judges, contra Allibone J. these faults are cured by the verdict. Carth. 67. Trin. 3 Jac. 2. B. R. Jeffries (Ld. Mayor) v. Watkins.

8. In debt upon the statute of tithes of 2 E. 6. and demanded the treble value, the plaintiff counted only that defendant had carried away the corn without setting out the tithe, but did not aver that defendant had not made any agreement with him for the tithes, as the statute mentions. The court was of opinion that the declaration was ill had it been demurred to, but was helped by the verdict, for had any agreement been proved at the trial, the plaintiff could not have obtained a verdict. Carth. 304. Pasch. 6 W. & M. in B. R. Alston & al' v. Buscough.

9. A. brought debt in right of his wife due to her before coverture, and counted that the debt was not paid to the wife, but did not say that it was not paid to him post desponsalia; it was adjudged ill upon a demurrer, though it had been good after verdict, cited by Treby Ch. J. as a late case. Ld. Raym. Rep. 284. Mich. 9 W. 3. Anon.

3 Salk. 29.  
S. C. ac-  
cordingly.  
—12 Mod.  
133. S. C. ac-  
cordingly.

10. Assumpsit in consideration that the plaintiff would accept C. to be his debtor for 20l. due to him from A. in loco A. and averred that he did accept C. fore debitorem, &c. This was adjudged good after a verdict, without express averment that A. was discharged, and judgment affirmed in the Exchequer chamber by 4 judges against 3. 1 Salk. 29. pl. 30. Pasch. 9 W. 3. Roe v. Haugh.

11. A



11. A verdict will aid a defective averment of the indorsement of a bill of exchange. See Bills of Exchange. East v. Effington.

12. In case upon an agreement that the plaintiff was to buy for the defendant all the plumbs he could, &c. the plaintiff shews that he bought so many, the want of averring that they were all he could buy is cured by verdict; for unless the plaintiff had proved that they were all that he had bought, or could buy, it would have been against him for want of proving the performance of the consideration. 2 Ld. Raym. Rep. 1060. Mich. 3 Ann. Anon.

See tit. Actions (Z. 8) pl. 49.

14. Where a verdict has found words spoken of the plaintiff as brother of the defendant, it is sufficient, though no averment was in the declaration that he was his brother. Comyns's Rep. 528. Pasch. 9 Geo. 2. C. B. Castell v. Baily.

[ 403 ]

(Y. a) Nudum Pactum, or where no good Assumpsit or Consideration of Suit is shewn, aided by Verdict.

1. **I**N a replevin, the defendant avowed for a rent-charge for that J. S. seised of a rent, bargained and sold it to him, and shewed the indenture to be inrolled within six months *virtute cuius*, and the statute of uses, he was seised, and for a year's rent since the assignment avowed. The plaintiff traversed the grant of J. S. prout, and found for the avowant, and moved in arrest of judgment, that he entitles himself by bargain and sale, and the statute of uses, and doth not shew that it was in consideration of money; but the court held the pleading good after a verdict; and it shall be intended that evidence was given of money paid. Vent. 108. Hill. 22 & 23 Car. B. R. Monnington v. Williams.

Lev. 308. Mannington v. Guillims S. C. accordingly, and judgment for the avowant.—Raym. 200. Guilliams v. Munnington S. C. and Twifden

thought the exception material, and judgment stayed until, &c.—S. P. where replevin was brought against the heir of a second grantee of the rent-charge, in which the plaintiff pleaded Non est factum of J. S. and issue thereupon, and verdict for the defendant, and the same exceptions taken, and also that this cannot be aided by the verdict, because the issue was taken upon the other deed of J. S. Sed non allocatur; for per cur. if the plaintiff had taken issue upon the bargain and sale, and it had been found for the defendant, it had been good after a verdict though no express consideration had been mentioned, as in the case of \* BARBER v. Fox, in the time of Car. 2. in B. R. where a bargain and sale was pleaded Pro quadam pecunie summa, without saying what sum, yet it was adjudged to be aided by the verdict. Then in this case the plaintiff has waived the benefit of this exception by taking issue upon the other deed; but if he had demurred this fault had been fatal to the defendant; but now after verdict it is good enough, and therefore judgment was given for the defendant. Nisi, &c. 2 Ld. Raym. Rep. 111. Mich. 8 W. 3. Stream v. Seyer.

\* The mentioning that case as adjudged upon the point mentioned seems to be by mistake, that case being another point, as may be seen at tit. Actions (Z. 3) pl. 21. and at tit. Heir (K. 2) pl. 13. but it seems that the case intended is the principal case above of Monnington v. Williams.

2. After verdict in *assumpsit* the judgment was arrested, because it was a *nudum pactum*, and the court would not intend a consideration. See tit. Actions (O) pl. 21. Mich. 4 Ann. Courtney v. Strong.

## (Z. a) Other Faults in Declarations, aided by Verdict.

Palm. 420.  
Harrison v.  
Ronke, S.C.  
—— Lat.  
310. Harri-  
son v. Peck,  
S.C. accord-  
ingly, and  
judgment  
for the  
plaintiff.

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1. **T**HE plaintiff set forth that he was *seised of a house and meadow, and prescribed for a way thereto, &c.* and after a verdict for him, many exceptions were taken to the declaration, as that it was not said to be *antiquum mesuagium*, nor shewed it certain whither the way did lead, nor in what town it was, nor what manner of way it was; it was held that the verdict had aided and made good all the imperfections in the declaration. 3 Bullst. 334. Hill. 1 Car. B. R. Harrison v. Rock.

2. In *debt upon bond for performance of covenants* in an indenture, the plaintiff declared, that *E. covenanted that J. S. was seised in fee*, whereas the indenture was, that *J. S. covenanted that E. was seised in fee*; this variance shall not stay judgment after verdict, for it was the defendant's fault not to take advantage of it upon a demurrer, but since issue is well joined upon affirmative and negative and found for the plaintiff, he shall have his judgment. Sid. 48. pl. 10. Mich. 13 Car. 2. B. R. Pigg v. Waters.

3. In *debt for a moiety of tithes* of D. it was found for the plaintiff, and now moved in arrest of judgment; that it appears by this declaration, that the plaintiff is tenant in common with another, for he has declared of the moiety; and being tenant in common, tenants in common must join in personal actions, As *debt* or *avowry* for damage feasant; but it was resolved that the plaintiff shall have judgment, for this being *after verdict shall not be intended a moiety in common, but a moiety in law*. Sid. 49. pl. 11 Mich. 13 Car. 2. B. R. Cole v. Banbury.

*Indebitatus*  
for money re-  
ceived by the  
defendant for  
the plaintiff,  
and laid *ad*  
*usum* of de-  
fendant. It  
was moved  
after ver-  
dict that

4. The declaration was, that the defendant was *indebted to the plaintiff in so much money recovered to the use of the defendant*; after verdict for the plaintiff it was moved in arrest of judgment, that an action would not lie for money received by the defendant to the defendant's use, but because it might be money lent which the defendant received to his own use, the court after verdict will presume that it appeared so to the jury. Mod. 42. Hill. 21 & 22 Car. 2. B. R. Nosworthy v. Wyldeman.

*assumpsit* lies not for money received by one to his own use. It was answered, that to construe this according to the words of the declaration, would directly contradict the verdict; and saying that it was for money received for the plaintiff, was sufficient without saying *Ad usum*, &c. and therefore the *Ad usum* superfluous being contradictory, ought to be rejected. And judgment nisi pro quer'. 12 Mod. 511. Pasch. 13 W. 3. Palmer v. Stavelly. — 1 Salk. 24 pl. 7. S. C. — Ld. Raym. Rep. 669. S. C. accordingly. — Comyns's Rep. 115. pl. 79. S. C. accordingly.

2 Keb. 734.  
pl. 26. Cal-  
thorp v. Ja-  
cobson, S.C.  
says, that  
Keeling Ch.  
J. held it ill,  
but curia  
contra, and

4. In *debt for rent*, the plaintiff declared, that he let the defendant such land, *anno 16 of the king, Quamdiu ambabus partibus placcret*; and that *anno 16* the defendant entered and occupied it *pro uno anno tunc proxime sequent'* and because the rent was behind *pro præd' anno finit'* 18. he brought the action, upon which it was demurred, because the rent is demanded for the year ending

18, and it is not shewn that the defendant enjoyed the land longer than *anno* 17. and in debt for rent upon a lease at will, occupation of the tenant must be averred; but it was answered, that *pro predicto anno* refers to the year mentioned before, which was next following the lease, and it might be said *finite anno* 18. for so it was ended then, or at any time after; and the court said, it would be clearly good after a verdict, but being upon a demurrer they would advise. Vent. 108. Hill. 22 & 23 Car. 2. B. R. Calthorpe v. that the finite is immaterial; sed adjournatur.

5. In *case* the plaintiff declared, that the defendants (the tenants and occupiers of such a parcel of land adjoining to the plaintiffs) have time out of mind maintained such a fence, and that from the 23d of April to the 25th of May, & postea the fence lay open, and that *una equa* of the plaintiff's went through the gap, and fell into a ditch the 28th of May, & submersa fuit. Upon Not Guilty pleaded, and found for the plaintiff, it was moved in arrest of judgment, that the *cause of action* is laid after the 25th of May, and (for aught appears) the fence might be good at that time, though it is said to be open till the 25th of May & postea; sed non allocatur; for 1st, It is after verdict. 2dly, It is said expressly, that the beast was lost in *defectu fensurarum*, and so cannot be intended but that it was down at the time. Vent. 264, 265. Mich. 26 Car. 2. B. R. Anon.

7. *Insensible* words in the declaration were helped by the verdict. See Carth. 131. Pasch. 2 W. & M. B. R. Nightingale and Fowles v. Bridges.

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8. If on *oyer* of the deed you have avowed otherwise than you ought, it may be taken advantage of, though after verdict, as they may of any thing which makes the avowry abateable; for we must judge upon the whole record; per Holt Ch. J. 5 Mod. 29 Trin. 7 W. 3. B. R. in case of Ward v. Evans, alias Everard.

9. In *trespass*, &c. the plaintiff declared that the defendant on 1 Feb. 8 W. 3. with force and arms, &c. Upon Not Guilty pleaded the plaintiff had a verdict. It was insisted that he could not have judgment, because the declaration was of Easter term last of a trespass done 1 Feb. 8 W. 3. which time is not yet come. On the other side, it was argued that this was helped by the verdict; for the plaintiff could never have had a verdict unless the trespass had been proved to be done before the bill filed; for he could give nothing in evidence after that time. And per cur. There must be evidence given of a fact done before the action brought; that the time is but a circumstance of a thing done; for when by a traverse it is made part of the issue, such traverse is never good; and so the plaintiff had judgment. 5 Mod. 286. Mich. 8 W. 3. Blackwell v. Eales.

Carth. 389. S. C. accordingly. — 12 Mod. 102. Blackhall v. Eccles, S. C. and this being moved in arrest of judgment, Northey for the plaintiff acknowledged, that if the time in the declaration had been

after the bill filed, and before the trial, the judgment must be arrested; because then it would have appeared the jury gave damages for an action arising since the suit commenced; but in this case the time being after the trial, it is as if there were no time at all, it being impossible, and therefore holpen after verdict. — S. C. cited 12 Mod. 109.

10. *Bis petitum* is aided by verdict, but ill upon demurrer; per Treby Ch. J. Ld. Raym. Rep. 241. Trin. 9 W. 3.

H h 4

II. Trespass

6 Mod. 80.  
S. C.

This is the  
only case  
where a  
bad pre-  
scription is  
held cured  
by verdict,  
and is easily  
answered;  
for first,

How was it possible that any finding of the jury could maintain that prescription, which the law says is naught? And yet that is the case here; for here the prescription was, that the defendant and all the occupiers of the said close, time out of mind, &c. This prescription was by the court held too general; for a tenant at will or disseisor may be occupiers. 2dly, This case is denied to be law, Mich. 9 Ann. Thorn v. Rookby; Arg. 10 Mod. 300, 301, in case of Muston v. Wateman.

11. *Trespass laid in a former king's time, contra pacem of the present, is ill on demurrer, but cured by verdict.* 2 Salk. 640. pl. 11. Mich. 2 Ann. B. R. Day v. Muskett.

12. *Where a prescription was laid in all the occupiers of such a close, for that they time out of mind have repaired a fence; this is too general, and therefore ill; for tenants at will or at sufferance, disseisors, &c. are occupiers, and they cannot charge the land; yet because issue was taken upon the prescription, and a verdict had found it, adjudged that it was helped by the statute.* Cro. E. 445. pl. 9, Mich. 37 & 38 Eliz. C. B. Austye v. Fawkener.

13. *A verdict will not cure where upon the declaration it manifestly appears, that no evidence whatsoever can maintain the issue;* per cur. 10 Mod. 313. Pasch. 1 Geo. B. R. in case of Stafford and Forcer.

14. *In an action on a policy of insurance the plaintiff counted that the ship was laden with goods, and bound from S. to T. and that the ship aforesaid and goods aforesaid were drowned. After judgment for the plaintiff it was assigned for error, because the goods only, and not the ship, were insured. But per cur. This being only an insurance on the goods, nothing could be given in evidence at the trial but the loss thereof, without which the plaintiff could not have a verdict, and judgment was affirmed.* 8 Mod. 380. Trin. 11 Geo. 1. Cambridge v. Lea.

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15. *Whatever is essential to the gist of the action, and cannot be cured by a verdict, are such substantial facts as must be laid in proper time and place, so that the defendant may traverse them distinctly, if he pleases; for as he may traverse the whole, so he may traverse each substantial part, in order to put the weight of the cause upon any thing that will put an end to the cause; and this is allowed that the jury may be more easily attainted of false verdict; but such part of a declaration as cannot make a substantive issue shall be intended after verdict, because they are matters of form only, which the statute designed to cure, and therefore if the plaintiff declares that the defendant promised, if the plaintiff married his daughter at his request, that he would give him 10l. and alleges in fact that he did marry her, but does not allege any request. This is good after verdict, because the request is only a form, in which the promise was conceived, and not an essential part of the promise to be proved to be precedent to the marriage; for the father, unless he had desired the match, had never made the promise; and therefore, secundum subjectam materiam, it cannot be supposed by the intention of the parties that a previous request should be necessary, and therefore shall be intended after verdict.* G. Hist. of C. B. 111, 112.

## (A. b) Mistakes or Omissions in Pleadings, aided by Verdict.

1. **I**N *præcipe quod reddat* the tenant for life made default after default, and he in reversion prayed to be received. The demandant said that he had nothing in the reversion the day of the writ purchased, and did not say *Nor ever after*, whereas he who purchases the reversion pending the writ shall be received, yet there if it be found for the prayor he shall be received; for the verdict has made the plea good. Contra if they had found that he had nothing in reversion the day of the writ purchased; for it may be that he purchased pending the writ. Br. Verdict, pl. 91. cites 21 H. 6. 13.

Br. Countersple de Receipt, pl. 9. S. C.

2. In *formedon* the tenant confessed the action, and G. came and prayed to be received by reversion, and pleaded that the tenant had only for term of life, the reversion to him. The demandant counterpleaded that he had nothing in reversion the day of the writ purchased, and found for the prayor, by which he was received; for it is not jeofail where it is found for the prayor in the affirmative; for though he ought to have said that Nothing in reversion the day of the writ purchased, nor ever after, yet now it is good. Contra if it had been found for the demandant in the negative; for there it may be that he had by purchase or by descent pending the writ, though he had not the day of the writ purchased, and then jeofail. Contra here; for now the verdict has made the plea good. Br. Repleader, pl. 18. cites 22 H. 6. 14.

3. In *præcipe quod reddat* the tenant pleaded *Non-tenure* the day of the writ purchased. This is no plea; for he ought to say *Nor ever after*; for purchase pending the writ, makes the writ good, and yet in the first case, if the verdict finds that the defendant was tenant the day of the writ purchased, this suffices; for the verdict makes the plea good. Br. Verdict, pl. 53. cites 3 H. 7. 8.

Br. Verdict, pl. 54. cites 5 H. 7. S. P. per Hussey. —But if it be found that the tenant was not tenant

the day of the writ purchased, there this remains a jeofail, but is now cured by the statute of 32 H. 8. cap. 30. where it passes by verdict. Ibid. —Br. Verdict, pl. 55. cites 6 H. 7. 6. S. P. accordingly. —Br. Verdict, pl. 91. cites 21 H. 6. 13. S. P. accordingly.

4. So of jointenancy. Br. Verdict, pl. 53. cites 3 H. 7. 8.

5. The like of arbitrators and umpire, if the defendant says that the arbitrators made no award, this is no plea; for he ought to say *Nor the umpire*; and yet if the jury says that the arbitrators made an award, this makes the plea good; quod nota, per Hussey Ch. J. For none denied it. Ibid.

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6. If a man pleads, in debt against executors, *Riens enter mains* the day of the writ purchased, and does not say *Nor ever after*, yet if the other avers the contrary, and it is found for him, then it is well; for the verdict has made the plea good. Br. Verdict, pl. 54. cites 5 H. 7. 14. per Hussey.

Br. Verdict, pl. 55. cites 6 H. 7. 6. S. P. accordingly, that it is made good by the

statute of 32 H. 8. —But if it be found that he had *Riens enter mains* the day of the writ purchased, there this remains a jeofail; but now it is remedied by the statute of jeofails 32 H. 8. 30. where it passes by verdict. Ibid.



*But where the matter of the plea is good, and it is found, but is not formal in omnibus, there the verdict may make the plea good.*

7. In *trespass* the defendant pleaded accord, that he should make two windows, and pay 10l. to the plaintiff, which he has paid. The plaintiff replied that *No such accord*, and found for the plaintiff. The verdict has not made the plea good; for the matter of the plea is not good; for accord ought to be executed, and he has not shewn execution of the windows. Br. Verdict, pl. 82. cites 6 H. 7. 16.

Ibid.

### (B. b.) Other Faults in Pleadings aided by Verdict.

1. **I**N *trespass*, per Keble, where *feoffment* is pleaded, and not good, and it is found that *Ne infeoffa pas*, there the verdict has made the ill plea good by the statute of jeofail 32 H. 8. Br. Verdict, pl. 55. cites 6 H. 7. 6.

2. In *ejectment* the defendant pleaded a special bar. The plaintiff by replication confessed and avoided it, and also traversed. The issue was found for the plaintiff. It was assigned for error, that the issue was taken where no issue ought to have been, because the bar was confessed and avoided. Sed non allocatur, because it is remedied by the statute of jeofails. Mo. 693. pl. 959. in Cam. Scacc. Smithwick v. Bingham.

10 Mod. 7.  
S. C.

3. *Debt on a penal bill for 300l.* The defendant pleaded *Nil debet*, and the plaintiff took issue thereupon. And the jury found *Nil debet for 200l. and debet as to 100l.* Per cur. The plea is ill, but the verdict has made it good. We will intend 200l. paid, and an acquittance under seal produced in proof thereof; and the jury may as well apportion here as in debt on a simple contract, where they may find *Nil debet* for part. 2 Salk. 664. pl. 8. Mich. 9 Ann. B. R. Hadley v. Stiles.

4. As the plaintiff's action must have all essentials necessary to maintain it, so the defendant's bar must be essentially good; and if the *gist of the bar* be naught, it cannot be cured by a verdict found for the defendant; but if it had been found for the plaintiff, he shall have judgment either for the badness or falshood of the bar; but if it be *bad only in form*, a verdict will cure it; and if the *gist be traversed*, all collateral circumstances will be intended after verdict. G. Hist. of C. B. 112.

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See (M) supra pag. 326. 327.

### (C. b) Discontinuance in Pleadings aided by Verdict.

If a defendant pleads to part, and says nothing to the other

1. **T**R*esp*ass is brought of *grass cut*, and of *goods carried away*, and of *battery*, and the defendant justifies for the *grass* and the *goods*, and says nothing to the *battery*. If the plaintiff does not demand judgment immediately for the *battery*, nor has entry thereof,



thereof, but *joins issue to the other two points*, and it is found for him, this is jeofail. Per Ascue, the reason seems to be inasmuch as the damages are intire. Quia nemo dedixit. Br. Repleader, pl. 48. cites 21 H. 6. 33. and 22 H. 6. 8.

part, and the plaintiff replies to such plea, without taking judgment

for part of the plea not answered to, this is a discontinuance, because he does not follow his intire demand in the count; but such discontinuance is cured by the verdict, because it was the intent of the statute, that when they descended to issue they should wave all objections of this nature; for both parties by extending to issue supposed a cause in court; and therefore they should not afterwards make any objections that the cause was out of court before trial. G. Hist. of C. B. 125.

2. *Trespass quare clausum fregit pedibus ambulando, &c. Et cum averiis deputaturat' conculcat' with oxen, horses, cows, sheep, Et hogs.* The defendant pleads Quoad venire vi & armis, nec non totam transgressionem præd' præter pedibus ambulando & præter the horses, oxen, sheep, and cows Not guilty, and *says nothing as to the hogs*, but leaves the hogs out, and verdict pro querente. Windham held this a discontinuance in pleading, and that it is helped by a verdict. But Bridgman Ch. J. said that as to the question of discontinuance, he was never satisfied in it, discontinuance in pleading, as he thought, not being aidable, but discontinuance in process is; and it was doubtful to him whether it was the intent of the statute. In Sir John Barrington's case a discontinuance in pleading was not helped. A venire facias de novo was awarded. Cart. 51. Hill. 17 & 18 Car. 2. C. B. Ayre v. Glossam.

Ibid. Bridgman Ch. J. put the case following, viz. in trespass and ejectment for entering into three acres, the defendant pleads one plea as to one, another as to another, and nothing to the 3d acre, if issue is joined and verdict for the

plaintiff; he asked, What will you have become of the 3d acre? Will you have it a discontinuance for the 3d acre, or a bar or a new action? He said he had been always of opinion, and some of the judges seem to be of that opinion, that a discontinuance in pleading shall not be helped by the statute of jeofails.

3. If the verdict itself made a discontinuance, and *found part of the declaration, and nothing to the other part*, this is a discontinuance not cured by the statute, because the intent of the issue is, that the whole event of the matter in issue shall be determined, and the answering to part, does not answer to the precept of the court, nor to the design of the issue, which is to determine the whole cause, that so it may be a bar to any other action. So that such imperfect verdict ought not to be received by the judge of nisi prius, it not answering to the issue, and if it be received it ought not to be entered of record, and if it be, it is erroneous, because the whole matter in issue is not answered, and a venire facias de novo ought to be awarded, so that the whole matter in issue may be determined in that action, and this is not aided by the statute, which did not intend to help imperfections of the verdict, which is still designed to make an intire end of the issue, but it helps the discontinuance before the verdict, because the verdict is a foundation by the statute for the judgment, which the parties cannot by mistake change or alter. G. Hist. of C. B. 125, 126.

\* An informal issue is where it is not traversed in a right manner.  
G. Hist. of C. B. 118.

(D. b) \* Immaterial, Informal, or Impossible, and Improper Issues, aided by Verdict.

1. *DEBT* against executors, who pleaded that they had not administered as executors any of the goods which belonged to the testator at the time of his death. And per cur. the issue is not good; for it may be that they have recovered debt as executors after the death of the testator, and it may be that they have retaken goods which were taken by a trespassor, or recovered damages for them; but the verdict found that they administered goods which were the testator's at the time of his death, and therefore the verdict has made the plea good. Quod nota. Br. Verdict, pl. 11. cites 7 H. 4. 39.

3. Le. 66.

pl. 99.

Mich. 19 & 20 Eliz.

C. B. Kirlee

v. Lee, S.C.

is, that the

promise was

to board them

and two servants,

and to find pasture

for 2 geldings, &c.

The defendant

confessed

the promise as to

boarding the plaintiff

and his wife, but

traversed as to the

servants and geldings.

The plaintiff

replied, that the

defendant promised

to find, &c. for 3

years next following,

and so to issue,

and found for the

plaintiff. It was

moved that the

replication affirmed

another

assumpsit than that

whereof he declared,

and this is not a

mis-joining, but a

not-joining of issue,

and not helped by

the statute of jeofails,

and the court held

this a material

exception, and Ld.

Dyer conceived it

a departure.—2

Le. 195 in pl. 244.

S. C. cited in the

very words of

Goldb. 56.

2. The plaintiff counted of a covenant to have three years board in marriage with the defendant's daughter. The defendant pleaded that he did not promise two years board, and so issue was joined and tried. This is not aided by the statute, because it is no issue, and did not meet with the plaintiff. Godb. 56. Arg. cites 19 Eliz.

3. In debt on bond the defendant pleaded the statute of usury, because it was made for the sale of certain copperas, and he took more than was limited by the statute, and that it was made by shift and chevifance, and alleged other matter to prove it within the statute. The plaintiff replied that it was made upon good consideration, and traversed the delivery of the copperas, which was an ill issue clearly, and it was found for the plaintiff, and this was alleged in arrest of judgment; and yet there being an issue tried, although it was mis-joined, the exception was disallowed, and judgment for the plaintiff. Goldsb. 39. pl. 15. Mich. 29 Eliz. Mounsay v. Hildyard.

4. Debt upon bond for performance of covenants on a charter-party, one whereof was to deliver a ship then in London at such a port, and no time limited for it. The breach assigned was, that he did not deliver the ship on such a day, and issue was taken upon the delivery, and found for the plaintiff. After judgment it was assigned for error, that the issue was not well joined, because he had time during his life to deliver it; but adjudged that this mis-joining of issue was remedied by the statute of jeofails, being after a verdict. Mo. 695. pl. 966. Trin. 32 Eliz. Bishop v. Gyn.

5. In trespass for taking 5 horses, the defendant justified that G. was amerced for bloodshed within the leet, and that the lord of the manor, time out of, &c. had used to distrain the beast of any which

came

came within the manor, and was in the possession of any man who was amerced for the amercement, and that the horses were in the possession of G. *Issue was taken that they were not in the possession of G. and found for the plaintiff.* Error assigned was, that the issue was joined upon a thing merely void, and so no issue, and not aided by the statute of jeofails. The court agreed *if there be no matter of bar in the plea, and the issue is joined upon it, it is void, and not helped by the statute; but if the plea contains matter of bar, and issue is joined upon a thing not material, it is helped by the statute; for here is no matter of bar, for the prescription is agreed to be void, and then if no bar, no issue; and judgment being given upon the verdict, where no issue was joined, is erroneous, and agreed that judgment be reversed, but would advise till next term.* Cro. E. 227. pl. 14. Pasch. 33 Eliz. B. R. Lovelace v. Grimsden.

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6. The lessee *covenanted to repair, and the breach assigned was, that he suffered the house and premises to be ruinous, & sic non reparavit.* The defendant *pleaded that he did not suffer the premises to be ruinous, and so to issue, and the plaintiff had a verdict, and judgment in C. B.* Error was assigned that the issue was misjoined; for the covenant was to repair, and the breach assigned was non reparavit; but the issue was non permisit esse in decasu. But per tot. cur. the issue is good; for *non reparare* is all one as *permittere esse in decasu*, and so the judgment was affirmed. Mo. 399. pl. 523. Pasch. 37 Eliz. Hide v. Dean and Canons of Windsor.

Cro. E. 457. (bis) pl. 1. Pasch. 38 Eliz. S. C. and the court held it aided by the statute. — 5 Rep. 24. a. b. Mich. 43 & 44 Eliz. B. R. S. C. but S. P. does not appear.

7. *Assumpsit*, the defendant pleaded *Not Guilty*, and found for the plaintiff. It was moved that this was not any issue in this action. But all the court held, that altho' it be not a proper issue in this action, and therefore the plaintiff might have demurred thereupon, yet because in this action there is a *disceit alleged to charge the defendant*, *Not Guilty* is an answer thereto, and that it is but an issue misjoined, which is aided by the statute, being after verdict; and this is *an issue, but an imperfect one.* Wherefore, absente Owen, it was adjudged for the plaintiff. And Walmsley said, that he had many precedents in B. R. of that issue joined, and tried in this action, and judgment thereupon. Cro. E. 470. pl. 29. Pasch. 38 Eliz. B. R. Corbyn v. Brown.

It was held no good issue in *assumpsit*; but in action on the case for *disceit*, or *tort*; it is a proper issue. Palm. 393. Mich. 21 Jac. B. R. Turner v. Turnerville. — 2 Roll.

Rep. 368. S. C. accordingly. — In an action for *debt*, if *Not Guilty* be pleaded, and there be a verdict for the plaintiff, it shall be aided by the statute, because being an ill plea and a false one, the plaintiff ought to have his judgment, both for the badness and for the falshood; but if the verdict was for the defendant, yet the plaintiff should have judgment, because the deed is not answered by the bar. G. Hist. of C. B. 124.

8. *Debt* upon bond, the defendant *pleaded the statute of usury, and that corrupte agreeatum fuit* between them, and that the plaintiff *corrupte recepit so much.* *Issue was taken upon both; and found for the defendant.* It was moved that the double issue was a mistrial and not remedied by any statute; but per cur. e contra; for when issue is taken upon one thing material and another immaterial

S. C. cited; Arg. Hard. 40.

*terial*, and both found for the defendant, it is a sufficient warrant for the court to give judgment for the defendant. Moor 574. pl. 790. Hill. 41 Eliz. Johnson v. Clerke.

9. Error of a judgment in *trespass*, assault and battery, for that the defendant *pleaded in bar a concord*, but it was *not with satisfaction*; also as it was pleaded it was not for the same trespass, and so void, and yet the issue was taken thereupon, and *found for the plaintiff*, and judgment given upon the verdict, where it should be given for the insufficiency of the plea; but the court held, that although this plea was ill, so as the plaintiff might have demurred to it, yet it is not merely void, for that concord is a good plea in this action, and altho' it be not sufficiently pleaded, no advantage shall be taken thereof after verdict, but it is helped by the statute 32 H. 8. of issues misjoined. Cro. E. 778. pl. 11. Mich. 42 & 43 Eliz. B. R. Dighton v. Bartholomew.

S. C. cited  
8 Mod.  
376. and

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per cur.  
this was a  
case where  
the issue was

10. In battery-by J. C. against T. C. the defendant pleaded *De son assault demesne absque tali causa per ipsum J. C. superius allegat'* and so to issue, and found for the plaintiff. The *traversing the matter alleged J. C. whereas it was alleged by T. C.* was held to be only a misprision, and it was ordered per tot. cur. to be amended. Cro. E. 752. pl. 12. Pasch. 42 Eliz. B. R. John Coston v. Thomas Coston.

informally joined.

S. P. aided  
by the ver-  
dict. Vent.  
34. Trin.  
21 Car.  
B. R. Anon.  
\* S. C.  
cited by the  
name of

11. In *trespass*, the defendant *justifies that he had common for all his beasts levant & couchant* in the place where, &c. by prescription, and put in his cattle *utendo communia*, &c. but did *not aver that his cattle were levant*, &c. Judgment for the plaintiff; for the want of averment is helped by the statute of jeofails. Cro. J. 44. pl. 12. Mich. 2 Jac. B. R. \* France v. Tringer.

France v. Tringer. Saund. 228. per cur.——S. C. cited Arg. Ld. Raym. Rep. 168.

Yelv. 54.  
S. C. held  
accordingly  
by three,  
the estate of  
E. B. being  
in a manner  
and by cir-  
cumstance  
material;  
for if she  
was seised  
in tail, and  
that tail de-  
scended to  
T. from E.  
then by her  
death the  
rent deter-

12. Replevin the defendant *avowed, for that E. B. was seised, and took T. P. to husband; and had issue J. P. and died*, that T. P. being tenant by the curtesy, J. P. granted a *rent-charge*, and so avows. The plaintiff replied, *that E. B. was seised in tail, and that J. P. granted the rent, and died, and the land descended to the defendant's wife as heir in tail, absque hoc that E. B. was seised in fee*; after verdict it was moved, that the issue was not well joined, for the seisin of the grantor ought to be traversed, and not the seisin of any ancestor paramount; but by all the justices *præter Gawdy*, in regard the seisin in fee is especially alleged in E. B. and the conveyance of the reversion to J. P. therefore the seisin in E. B. might well be traversed, and if it be not an apt issue, yet it is an issue, and helped by the statute of 32 H. 8. of jeofails. Cro. J. 44. pl. 11. Mich. 2 Jac. B. R. Piggot v. Piggot.

mined after the fee descended to J. from E. C. there the estate was of that nature, that he might grant a sufficient rent-charge, and although it might well be presumed that J. after the fee descended to him from E. had altered such estate tail, yet by Popham the courts shall not now intend that, because the parties doubted nothing but whether E. was seised in fee or tail when she died, and that doubt is resolved by the verdict, As if a defendant should plead a deed of J. S. to A. and B. and that A. died, and B. survived and infeoffed the defendant, if the plaintiff should say that J. S. did not infeoff A. and that they should be at issue upon that, and should

should be found against him, although this be no apt issue, yet it is helped by the statute, because the parties doubted of nothing but of the manner of the seoffment of J. S. whether it was made to A. or not.——Brownl. 183, 184. S. C. in totidem verbis, and seems only a translation of Yelv.——G. Hist. of C. B. 120. cites S. C. and says, though this was an informal action, for that the plaintiff ought to have traversed that J. the grantor was seised in fee, yet it is a decisive issue, for it is allowed on both sides that John was in by descent from E. and if E. was seised in fee, J. was so too, and consequently had good right to make the grant.

13. *Trespass for entering his house and taking his goods, the defendant pleaded Not Guilty as to the goods, and to the entry pleaded the licence of the plaintiff's daughter; the plaintiff replied, that he did not enter by her licence. The first issue found for the defendant, and the 2d for the plaintiff, and damages assessed to 80l. Williams and Yelverton held the issue ill, for he ought to have traversed the entry by itself, or the licence by itself, and not both together; and Popham agreed that the issue was ill, had it been at common law, but it being tried it is made good by the statute 32 H. 8. which aids misjoining of issue; for though the entry by the licence is pregnant, yet a negative pregnant is an issue; et adjournatur. Cro. J. 87. pl. 13. Mich. 3 Jac. B. R. Myn v. Coles.*

G. Hist. of C. B. 123. cites S. P. and seems to intend S. C. and says, that if the issue be joined on a negative pregnant that is an issue that rather supposes an affirmative than the contrary,

Though it is bad on a demurrer, because the plea, &c. is not a certain affirmation or negative of any single point in question, yet after verdict, this being only an error in phrase shall be good, As if an action of trespass be brought for entering into his house, the defendant pleads the daughter licensed him to enter, by which he entered, the plaintiff replies, Quod non intravit per licentiam suam, though this replication be a negative pregnant it is good after verdict.

14. In *replevin* the defendant pleads that it is his *franktenement*; the plaintiff replies, that the beasts escaped thence by default of the enclosure, &c. The defendant replies, that tempore captionis the hedge was well repaired, and issue upon that is found against the plaintiff, who now moved in arrest of judgment, that is not a good issue; for it ought to have been tempore escapii, or intrationis, but by the court that was now disallowed, being moved after a verdict. Noy 115. Bafford v. Ventres.

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15. In *trespass for taking and impounding his goods*, the defendant pleaded the common bar; the plaintiff replied and assigned the place, and thereupon they were at issue, and a verdict for the plaintiff; it was moved in arrest that this was no issue, because the lands are not in question, and therefore no assignment necessary, and judgment was stayed; but adjudged afterwards for the plaintiff, for the issue was holpen by the statute of jeofails. Brownl. 200. Hill. 6 Jac. Plant v. Thirley.

Hob. 176. pl. 197. Hill. 14 Jac. Plant v. Thorley S. C. but not exactly S. P.

16. In *trespass of false imprisonment*, the defendant justified as constable, but the justification was ill; the plaintiff takes issue de son tort demesne, and found for the defendant. It was held by the court, although the justification was not good, yet being an issue and tried, judgment shall be against the plaintiff, and judgment accordingly. Cro. J. 251. pl. 3. Mich. 8 Jac. B. R. Booker v. Evans.

17. An issue upon that which the defendant does not claim is void, and tho' issue be joined, yet it is not helped by the statute of jeofails of 18 Eliz. or 32 H. 8. for it is no issue when it is of a thing not in question; but if the issue had been of a matter in question,



question, though ill joined, yet it is aided. Arg. And Doddridge and Crooke J. seemed to incline thereto. Brownl. 229. Trin. 11 Jac. in case of Waldron v. Moore.

18. In *trespass*, &c. for taking his goods, the defendant pleaded that the plaintiff 5 Jac. acknowledged a recognizance of 100l. to be paid at Mich. next, but did not pay it at the day, and that 2 years after he extended the recognizance upon his goods, and so justified, &c. The plaintiff replied, that the money was paid 6 Jac. and concludes to the country, and found for the plaintiff. It was moved in arrest that there was no issue joined, because the defendant had alleged in his plea, that the money was not paid at Michaelmas 5 Jac. and the plaintiff in his replication affirmed it to be paid 6 Jac. which was a year after the day on which the defendant had alleged the default of payment, and so no answer to the plea, and then concludes to the country upon his own allegation, that the money was paid 6 Jac. without staying for the defendant's rejoinder, that it was not then paid, but adjudged that it is an issue, though not so good as it should be, and is helped by the statute 18 Eliz. and though payment simply is no good plea to avoid a recognizance, yet after a verdict the defendant shall not take advantage of it. Brownl. 225. Pasch. 11 Jac. Miles v. Jones.

19. In *trespass* for breaking his close, the defendant justified for a way, the plaintiff replied, *de injuria sua propria absque tali causa*, and so to issue, and verdict for the plaintiff. It was moved in arrest, that the issue was not well joined, for it ought to have been special; sed non allocatur; but adjudged per tot. cur. that it was helped by the statute of jeofails. Brownl. 200. Trin. 14 Jac. Swaff v. Solley.

20. In *trespass* issue was taken that a prebendary, &c. and all his predecessors, &c. had used time out of mind to keep a shepherd for the better keeping their sheep feeding together in a certain pasture, from the sheep of T. Earl of S. in the same place, and verdict accordingly. It was moved that the prescription was senseless to allege that the sheep could time out of mind be kept from the sheep of the Earl of S. being only one man's life, and so the verdict void; but adjudged for the plaintiff; for the substance of the issue was found, viz. the keeping the sheep of the prebendary feeding together, and the other part was only a consequent of it. Hob. 117. pl. 146. Trin. 14 Jac. Napper v. Jasper.

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S. C. cited  
Gilb. Hist.  
of C. B.  
120. and  
Tbid. 113.  
says, But if  
the bar be  
only bad in  
form a ver-  
dict will  
supply it,  
as if in debt  
on a bond

21. In debt on bond for payment of 60l. upon the 25th of June, 12 Jac. at his house in F. The defendant pleaded payment on the 20th of June at the said house secundum formam & effectum indorsamenti prædicti. The plaintiff replied, that he did not pay it the said 20th of June, the jury found he did not pay it the said 20th of June, and judgment thereupon. It was assigned for error, that the issue is taken dehors the matter of the condition, and so an ill plea and a void issue; for although it may be he did not pay it the 20th of June, yet it may be paid upon the 25th of June, and although it was shewed to be an ill plea, yet it is helped by the statute of 32 H. 8. but resolved it was not helped by the statute, for it is merely void, and no issue; but if it had been found for the



the defendant, that the payment was the 20th of June, peradventure the verdict had made it good, for payment before the day is a good payment at the day, and so judgment in C. B. was reversed. Cro. J. 434. pl. 2. Mich. 15 Jac. B. R. Holmes v. Bocket.

conditioned for the payment of 100 l. 25 Junii prox', and the de-

fendant pleads payment on the 20th of June, and it is according to the condition found that he did pay 20 l. though this bar be bad in form, because it does not follow the condition, and the plaintiff might have taken advantage of it on special demurrer, yet the verdict having found payment before the day, that in law is payment at the day, and the substance found; but where the gift of the bar is good, though some of the collateral circumstances are omitted, which the plaintiff by demurring generally might have taken advantage of, yet if they go to the bar, and that be found for the defendant, the verdict will cure this omission, because the collateral matters are admitted and waived by going to issue on the gift of the bar.

22. Error of a judgment in debt on bond conditioned to pay 105 l. the defendant pleaded payment of the aforesaid 100 l. *quas ad eundem solvisse debuit*; the plaintiff replied, *Non solvit prædict. 105 l. at the day, & hoc petit, &c.* It was found that he did not pay the 105 l. and judgment for the plaintiff. Error was assigned that there is not any issue joined, that here is another sum in the defendant's plea than in the condition, and another sum in the replication than in the bar, and so they *did not meet*, and thereby the issue ill, wherefore judgment in C. B. was reversed. Cro. J. 585. pl. 7. Mich. 18 Jac. B. R. Sandbank v. Turvey.

G. Hist. of C. B. 119, 120. S. C. that it is an immaterial issue not aided.

23. In debt on bond of 200 l. for payment of 100 l. 31 Sept. following, the defendant pleaded payment 31 Sept. according to the condition, and found that he did not pay; it was assigned for error that the issue and verdict was void, being upon the payment 31 Sept. Sed non allocatur; for there being no such day as 31 Sept. and the jury finding the money was not paid at that day, nor at any time before, they find in effect that it was never paid, which is a good verdict, and judgment was affirmed. Cro. C. 78. pl. 9. Trin. 3 Car. in Cam. Scacc. Purchase v. Jegon.

Jo. 140. pl. 6. Jiggon v. Purchase, S. C. adjudged for the plaintiff; for the condition being impossible, the obligation was due immediately, and it was an issue upon an insufficient bar, which being found for the plaintiff it is helped by the statute.——Lat. 158. Gibbon v. Purchase, S. C. and the court would not arrest the judgment.——Noy 85. Giggham v. Purchase, S. C. adjudged for the plaintiff.——G. Hist. of C. B. 122. S. C.——If an issue be on point that is impossible in the substance and nature of the thing, it is not cured by the verdict, but if it be only impossible in the manner and form of it, a verdict will cure, for where the substance is, no verdict can cure it, because it cannot make that true which cannot possibly be; but where it is only impossible in the manner of it, the thing which is possible may be found to be or not, and the manner which is impossible totally rejected. G. Hist. of C. B. 121.

24. Error of a judgment in debt for 20 l. the defendant pleaded *Solvit ad diem, & de hoc ponit se, &c.* and the plaintiff similiter; and the jury found for the plaintiff. It was assigned for error that here was no issue, for the defendant should have pleaded *Quod solvit, & hoc paratus est verificare*; and the plaintiff should have replied, *Non solvit, & hoc petit, &c.* and so there had been an affirmative and a negative; but as it is there is no issue at all. But per tot. cur. the defendant having pleaded payment, & de hoc ponit, &c. and the plaintiff having joined with him, and the jury finding that he was not paid, it is well enough, and aided by the statute of jeofails, and so affirmed the judgment. Cro. C. 316. pl. 9. Trin. 9 Car. B. R. Parker v. Taylor.

S. C. cited Sid. 290. pl. 5. Arr. and said it had been denied that it is good after a verdict.——

Id. 342. in

[ 414 ] pl. 5. Windham J. cited S. C. a held good after a ver-

a verdict, and the reporter observes that though this case was said to be denied (as above) yet now no notice was taken as to that.—G. Hist. of C. B. 122. cites S. C. that the defendant cannot take advantage of the informality of his own plea, and it is waived on both sides when they go to issue on the substance of it.

Sty. 210.  
Pasch. 1649.  
S. C. and  
Roll Ch. J.  
held it an  
immaterial  
issue, and  
that there  
can be no  
judgment;  
for the mat-

25. In *assault and battery*, the defendant *pleaded specially and justified*, the plaintiff *replied De injuria sua propria*, and had a *verdict*; it was moved that this *replication did not answer the special matter in the plea, nor takes any traverse by an absque tali causa*, as it ought, and so there is *no issue joined*, and consequently there can be no judgment. Roll Ch. J. held this not helped by the statute, and that it is not a mistrial but no trial, and here is *no issue*, and adjournatur. Sty. 150. Mich. 24 Car. Jennings v. Lee.

ter is not put in issue, and ordered a repleader.—S. C. cited Arg. Hardr. 46.—Sid. 341. pl. 5. Arg. cites S. C. that a repleader was awarded; but says the court, upon the 1st, and also 2d debate, were of opinion that it was good after the matter, which is the gist of the action, is found by the verdict.—G. Hist. of C. B. 123. cites S. C. that it is wrong after verdict, because the *injuria sua propria* does no more than affirm the declaration, and does not confess or deny the bar, and therefore the gist of the bar is not put in issue at all, but rather stands confessed by the replication, since the cause is not traversed; for saying it was *De injuria sua propria*, is not more than saying, that notwithstanding the cause mentioned in the bar, the defendant committed the injury, which the bar being a sufficient excuse, cannot be, but it does not in the least put the bar in issue.

\* Lev. 183.  
S. C. says the  
court at first  
doubted, but  
afterwards  
gave judgment  
for the plain-  
tiff.—  
2 Keb. 10.  
pl. 26. S. C.  
adjournatur,  
and 13. pl.  
33. S. C.  
adjournatur,

26. The defendant *covenanted that he was seised in fee, and in all* action brought, the plaintiff *assigned the breach, that the defendant was not seised in fee, & sic infregit* \* [non tenuit] *conventionem*; the defendant *pleaded Non infregit, &c.* and so to issue, and the plaintiff had a verdict; it was moved for a repleader because it was an issue on two negatives, and would introduce great uncertainties in issues to suffer such general and involved pleadings; but adjudged, this is not an immaterial but an *informal issue*, and cured by a verdict; however, they disliked it, and ordered that the attorney should be fined. Sid. 289. pl. 5. Trin. 18 Car. 2. B. R. Walsingham v. Coomb.

and 51. pl. 6. S. C. adjudged for the plaintiff, that it is aided as an informal issue by 32 H. 8.—G. Hist. of C. B. 124. cites S. C. and says that though in covenant the defendant ought to traverse either the deed or the breach, and both cannot be involved in non fregit conventionem, because the gist of the action lies on the deed, which must be traversed by itself; yet when the defendant pleads a bad plea, which is found against him, the plaintiff may have judgment either for the insufficiency or falsity of the plea. G. Hist. of C. B. 125.

2 Keb. 280.  
pl. 49. S. C.  
by the name  
of Burton v.  
Chapman,  
says, that in  
as much as  
the promise is  
confessed by  
pleading  
Non-age,  
the replica-  
tion is issue

27. In *case for wares sold*, the defendant *pleaded Non-age* at the time of the promise, to which the plaintiff *replied, that the wares were for necessaries, & hoc petit quod inquiratur per patriam, & prædictus defendens similiter*; after verdict it was moved, that here was no issue nor negative, and cited JENNINGS v. LEE, to which Windham inclined, but the other justices conceived this aided by the late stat. Car. 2. cap. 8. the right of the cause being tried; adjournatur, but afterwards the court held it good. 2 Keb. 278. pl. 43. Mich. 19 Car. 2. B. R. Buxten v. Chapman.

sufficient, especially after verdict upon Cr. 316. Taylor v. Parker, and there is no difference to this between a bar and a replication, but the issue after verdict is aided, and judgment for the plaintiff, nisi.—Sid. 341. pl. 5. Burton v. Chapman. S. C. accordingly, though objected that the want of a negative made it to be no issue.—G. Hist. of C. B. 122. cites S. C. that where the substance of the bar and the replication be put in issue, though it be informally, yet it is cured by the verdict, As if an assumpsit be for wares sold, and the defendant pleads *Non-age*, and

And the plaintiff replies they were for necessities, & hoc petit quod inquiratur per patriam & præd'. Defendens and says this traverse is informal, because the plaintiff ought not to have closed the issue, but to have given the defendant an opportunity of rejoining, that there may be a proper negative to his affirmative, yet since the matter of his replication be put in issue, viz. whether they were necessities or not, the defendant has waived all objections to the form, and by such a waiver it appears that he is not any wise injured by not rejoining, and found that they were necessities, the plaintiff ought to prevail.

28. In *trespass* of taking his horse, the defendant *justified for a distress for rent* arrear upon a demise of the place where, &c. by the defendant to the plaintiff. The plaintiff *replied, that the horse was not levant and couchant*; and issue thereupon, and verdict for the plaintiff. It was moved that this was an *immaterial issue*, and the court seemed to incline to that opinion, but afterwards the plaintiff had judgment by the opinion of the whole court. *Ld. Raym. Rep. 168. Arg. cites Hill. 20 & 21 Car. 2. C. B. Colwell v. Milnes.*

*Ibid. 169. Arg. says, that if it has but the semblance of an issue it shall be aided, and that might be the reason of the judgment in the case of*

*Colwell v. Milnes.*—S. C. cited *Arg. 2 Lutw. 1578.* says, that though it was moved, as appears by the rules in that case, that the issue was immaterial, yet the plaintiff had judgment.

In *trespass*, defendant *justified* of taking cattle as a *distress for rent*, the plaintiff replies that they were not *levant and couchant*; though this is an ill replication, yet if the defendant takes issue upon it, and it is found against him, the plaintiff shall have judgment. *Ld. Raym. Rep. 167. 170. Hill. 8 & 9 W. 3. Kempe v. Crewes.*—2 *Lutw. 1573 to 1582. Kimp v. Cruwes S. C.* and all the court were of opinion that now it shall not be taken that the issue was not material, and so the plaintiff had judgment.

29. *Unapt issues* are aided by the statute, but not *immaterial issues*; per North Ch. Justice and Scrogs J. *Mod. 225. pl. 14. Trin. 28 Car. 2. C. B.*

An immaterial issue no ways arising from the matter

is not helped; per North Ch. J. and Scrogs J. 2 *Mod. 137.*—A verdict cannot help an immaterial issue, because what is alleged in the pleadings is not put in issue, or if it be, is not decisive between the parties, and so the verdict is no good foundation for the judgment. *G. Hist. of C. B. 118.*

31. In *ejectment* for lands in the county palatine of Durham; upon Not Guilty pleaded, the plaintiff had a verdict; and upon a writ of error brought, the error assigned was that there was no issue joined between the parties, for the words (*super patriam*) were left out; but per curiam, here is an affirmative and a negative, and that makes an issue; it is true, it had been better if these words had been in, but the omission of them only makes the issue informal. So they affirmed the judgment. 3 *Salk. 209, 210. pl. 7. 5 W. 3. B. R. Hall v. Stich.*

32. To put a *matter of law in issue* to a jury is void. But Holt said it would be helped by a verdict. 11 *Mod. 46. pl. 11. Pasch. 4 Annæ, B. R.*

33. After a verdict for the plaintiff, it was moved that no issue was joined in the cause, it being *Et hoc petit quod inquiratur per patriam*, then these words should follow, & *prædictus* (the defendant) *similiter*, which were omitted. On the other side it was said that there is no occasion for amending this issue, because the appearance of the defendant is entered on the *postea*; besides, at the worst it is only an informal issue, and that is amendable at another day. The court said that in every material issue joined there

\* Where the issue is *material* the verdict will not aid it, but where it is *informal* it is helped. G. Hist. of C. B. 118.

there must be a verdict on one side, otherwise there can be no judgment, and the plaintiff would now have judgment for damages on a verdict found on an informal issue, as he alleges it to be, but on no issue joined, as the defendant says; now there is a *difference between an immaterial and an \* informal issue joined, and where there is no issue at all joined*; in the principal case the issue was tendered by the plaintiff, and never joined by the defendant, so there was *no issue at all*, which seemed to the court not amendable. 8 Mod. 376, 377. Trin. 11 Geo. 1726. Cowper v. Spence.

## [ 416 ] (E. b) Negative Pregnant, aided by Verdict.

See tit. Negative Pregnant.

\* Br. Negativa, &c. pl. 42. S. P. cites 3 H. 8. 46.

2 Bulst. 41. S. C. and S. P. accordingly. — Yelv. 227. Glasse's case. S. C. but reports it as an action of debt brought for rent arrear on a lease for years,

1. **I**N forcible entry, the *issue was if R. and K. disseised D. to the use of K. the other made title absque hoc that R. and K. disseised D. to the use of K.* and exception taken for pregnancy, and yet the *plaintiff recovered* by judgment, because the matter is if the disseisin was to the use of K. or not, but not guilty in K. is negative pregnant; but the reason seems to be \* because the *verdict* passed with the plaintiff, and *found the disseisin to the use of K.* and therefore the verdict *made the plea good*, but if they had found for the defendant that they did not disseise to the use of K. then it had been ill, quære. Br. Negativa, &c. pl. 33. cites 36 H. 6. 22.

2. *Jeofail or ill issue as negative pregnant, double plea, &c.* is made good by the verdict found with it, & *e contra* if the verdict be found the contrary. Br. Repleader, pl. 37. cites 12 E. 4. 6.

3. *Covenant to make a lease for years to the plaintiff of certain land; the plaintiff alleges in his count for breach, that the defendant nihil habuit in the said land; the defendant pleads Quod habuit, &c.* but does not shew what his estate is, a verdict finds *Quod non habuit*; the defendant's plea was faulty, for he ought to have shewn what estate he had, and to have shewn it in certainty, but the verdict has made the issue good at common law. Judged and affirmed in error, for the count was good, and the defendant's plea vitious, and the *verdict is found with the count*. The plaintiff had judgment. Jenk. 326. pl. 43. Mich. 10 Jac. Glas v. Gill.

but the pleading is the same, and so is the judgment; for though the issue is not so formally joined as it ought, yet it is an issue tried which may make an end of the matter; for it is found that the plaintiff had estate in the land whereof he might make the demise. — Cro. J. 311. pl. 12. Gyll v. Glais S. C. & S. P. as in Yelv. and judgment affirmed accordingly; but the court held that the defendant might have demurred. — Jenk. 340. pl. 97. S. C. & S. P. in debt for rent and judgment affirmed in error. — G. Hist. of C. B. 123, 124. cites S. C. and says, that though this had been had on a demurrer, because by not shewing what estate he had it is pregnant of this negative [viz.] that he had not such an estate by which he had power to demise, nor that he had not such an estate as he could demise.

## (F. b) Repleader after Verdict. In what Cases.

See tit. Repleader.

1. *DEBT* upon indenture of lease for 20 years concerning 10*l.* per ann. and other covenants ex utraque parte perimplendas & ad omnes conventiones perimplendas uterque eorum tenetur alteri by the same indenture in 20*l.* and for non-payment of 10*l.* at Easter last the lessor brought action of 20*l.* and the defendant said, that at the feast of Easter he was upon the land all the day ready to pay, and none came of the part of the plaintiff to receive; the plaintiff said, that such a day after the said feast he demanded the 10*l.* and the defendant refused to pay, to which the defendant said that he paid the 10*l.* the same day, and so to issue, and found for the plaintiff at the nisi prius. And per cur. this is jeofail; for the penalty refers to the feast of Easter only, which is excused by the tender upon the land at Easter-day, and the plaintiff intitles himself by a demand after the penalty saved, by which it was awarded that they replead notwithstanding it be after nisi prius when the defendant is not demandable; for yet he has day in court till judgment be given, and in several like cases the parties have repleaded; quod nota, by award. Br. Repleader, pl. 23. cites 22 H. 6. 57.

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2. Where there was a substantial variance between the plea and replication a repleader was awarded after verdict. Freem. Rep. 450. pl. 613.

As in trespass, the defendant pleads a licence to him

for himself, his wife and children, by the plaintiff. The plaintiff replies, that he did not give a licence to him and his wife modo & forma. After verdict for the plaintiff it was moved in arrest of judgment that here was no issue joined; for the defendant pleads a licence to himself, and the plaintiff says he gave none to him and his wife. And the court held this to be naught, and not to be aided by the modo & forma; for here is a substantial difference; because if the licence were given to him for to bring on his wife and children, if he died this would not serve the wife; but if it were a licence to him and his wife, if the husband died it would survive to the wife; and thereupon the court ordered a repleader. Freem. Rep. 450. pl. 913. Pasch. 1677. Anon.

3. In debt upon bond for the payment of money the 9th of Feb. the defendant pleads that he paid it the 9th day of Jan. preceding; and issue that he did not pay it the said 9th day of Jan. and upon that a verdict for the plaintiff. And now it was moved to plead again; for notwithstanding this verdict the plaintiff may be paid after the 9th day of Jan. and before the 9th day of Feb. when the condition was that the money should be paid, and therefore the bond perhaps was not forfeited, nor had the plaintiff any title of action; and it was argued that it was an immaterial issue, notwithstanding it was aided by the statute. And therefore it was ordered they should plead again. Comyns's Rep. 148. pl. 100. Trin. 5 Ann. C. B. Anon.

For more of Amendment and Jeofails in General, see other proper Titles, and the Pleadings under the several Titles throughout this whole Work.



## Amercement.

Fol. 211. (A) Amercement. For what Things an Amercement shall be.

This was said there by Hill [ 1. **FOR** a *rent distrainable* no amercement shall be in a leet. 11 H. 4. 89.]

privately. And 13 H. 4. 9. pl. 28. it was objected that the lord cannot amerce a deciner, &c. for non-payment of rent; but Thirn denied it, and said he might, where it is due and payable on the leet-day.—S. C. and S. P. cited per cur. 11 Rep. 45. 2.

Br. Distress, pl. 18. cites 11 H. 4. 89. [and which is part of the S. C.] [ 2. If the deciners ought to pay a rent to the leet *pro certo letæ*, (this is not properly a rent but a sum in gross) if they do not pay it they may be amerced, for this is due and payable at the leet. 13 H. 4. 9.]

[ 418 ] with 13 H. 4. 9.] and S. P. admitted.—Fitzh. pl. 57. cites 11 H. 4. 89. S. P.—S. C. cited accordingly, per cur. Mich. 12 Jac. 11 Rep. 44. b. in Godfrey's case.—Yelv. 186, 187. in case of Godfrey v. Bullein. Mich. 8 Jac. B. R. the S. P. admitted.—Brownl. 190. S. C. & S. P. admitted, but seems to be only a translation of Yelv.

3. In assise it was found that the plaintiff was seised and disseised, but not of so much of the land as he shewed in the plaint, but he put no more in view than that of which he was disseised, and therefore he recovered by award, and was not amerced for the surplusage, quod nota bene; for disseisin is as trespass, so that if he be guilty of part, and of part not, yet the plaintiff shall recover for the part; quod nota. Br. Assise, pl. 180. cites 12 Aff. 14.

4. Avowry for two sheep for 2d. and twelve oxen for 9d. the defendant was amerced to 23s. for the excess of the distress; quod nota bene. Br. Amercement, pl. 8. cites 41 E. 3. 26.

This is misprinted (32) for (12) and so the other editions are.—It must be for a thing which is a common nuisance, or else it is extortion, per Fenner J. to which Periam J. agreed. Godb. 135. pl. 158. Hill. 39 Eliz. cites 11 H. 4. 5. The lord in his leet may amerce for common nuisances and the like. Br. Leet, pl. 12. cites 32 [12] H. 4. 8.

But for suit service by tenure 2 man shall be distrained and not amerced; note a diversity. Br. Amercement, pl. 44. cites 12 H. 7. 14. 6. In replevin for suit real to the leet a man shall be amerced. Br. Amercement, pl. 44. cites 12 H. 7. 14.

7. The lord may amerce for a common trespass, or a trespass done in the land of another, per Gawdy J. Le. 242. in pl. 327. Mich. 32 & 33 Eliz. B. R.

8. If a tenant be amerced, and before it be levied tenant dies, it is lost; for it is quasi actio personalis. Cro. E. 351. pl. 3. Mich. 36 & 37 Eliz. B. R. Jackman v. Hoddesdon.

9. Lord prescribed, that if tenant do a rescous, or drives his cattle off the land when the lord comes to distrain, that the tenant shall be amerced by the homage, and that the lord may distrain for the same,



same, and Anderson and Rhodes J. held it a good custom, and vouch 11 H. 7. where the lord had 3l. for a pound breach. Godb. 135. pl. 158. Hill. 39 Eliz. Anon.

10. A resiant may be amerced for *non-attendance at the leet*, he being warned. Mo. 88. pl. 221. Pasch. 10 Eliz. Lukin v. Eve.

(B) What Person may be amerced. [*Infant.*] See (L) S.P.

[1. *I* a writ of *partition* against an *infant*, if he *pleads with the demandant*, and it is found against him, he shall be amerced. 9 H. 6. 7.]

(C) Amercement. Not for a Wrong to the Lord. [419]

[1. *A* Man shall not be amerced in a leet for a *trespass to the lord himself*, for he shall not be his own judge. 12 H. 4. 8. b.] The lord's doing so is not lawful, unless it be by custom. Br. Amercement, pl. 19. cites S. C.—Br. Custom, pl. 16. cites S. C. that it may be good by custom, especially where the trespassor pays the amercement.—Br. Leet, pl. 12 cites S. C. [though in the large edition it is misprinted (32) for (12)] accordingly, and the lord's levying it is a good bar to him in trespass though there be no such custom.

[2. But he may be amerced for *non-payment of certum letæ* to the lord, he being a deciner, 13 H. 4. 9.] See (A) pl. 2. S. C. and the notes there.

(D) Amercement affeered. In what Cases it shall be affeered. What [*it is.*]

[1. *A*N amercement in Latin is called *Misericordia*, because it ought to be assessed mercifully, and this *ought to be moderated by affeurement of his equals*, or otherways a writ de *Moderata misericordia* lies. Co. Litt. 126. b.] S. P. by which it seems that it ought to be less than the offence.

F. N. B. 75 (H)—S. P. 8 Rep. 139. a (c) and that the word (Affeer) is as much as to say in *certitudinem ponere seu taxare*, &c.

The writ of *Moderata misericordia* is founded on the statute of *Magna Charta*, cap. 14. F. N. B. 75. (A)—2 Inst. 28. S. P.

2. *Westm. 1. 3 E. 1. cap. 6. No city, borough, town, or men shall be amerced without reasonable cause,*

that seeing the words of the statute of *Magna Charta* were *Liber homo non amercietur*, &c. it extended not only to natural and singular men, but to sole bodies politick or corporate, and not to corporations or companies aggregate of many, as cities, boroughs, and towns. Another mischief was, that many times not only cities, boroughs, and towns, but private men also were amerced without cause. Lastly, that the said statute of *Magna Charta* extended but to him that was *Liber homo*.

For all these 3 this statute provides, viz. that no city, borough, or town, nor any man shall be amerced without reasonable cause, and according to the quantity of his trespass, and upon this statute the party grieved may have an attachment without any prohibition precedent; for this act is a prohibition of itself; and yet the Mirror does take it, that all this was contained in the grand charter. 2 Inst. 169, 170.

Here *tres-*  
*pafs signi-*  
*fies offence,*  
*fault, or*

*And according to the quantity of trespasss, viz. every freeman saving his freehold, a merchant saving his merchandize, a villain saving his gainure, and that by his or their peers.*  
default, and so it is taken in many ancient records, as taking one example for many; the statute that is called Ragman, ordains that justices shall go through the land, to enquire, hear, and determine the complaints and querels of trespasss, as well of the bailiffs and ministers of the king as of others, and of other people whatsoever they be, except appeals of felony, &c. which was understood as well of outrageous takings as of all manner of trespasss, contempt, neglect, default or offence to the king or any other, &c. 2 Inst. 170.

There were  
4 *mischiefs,*  
or rather

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grievances,  
before this

3. *West. 1. cap. 18. 3 E. 1. The common fine and amercement of the whole county in Eyre of the justices for false judgment, or other trespasss, shall be assessed by the said justices, upon the oaths of knights and other honest men, and not by sheriffs and barretors, as in times past hath been used; and the said justices shall cause the parcels thereof to be estreated into the Exchequer, and not the whole sum only.*  
act; 1st, That this common fine and amercement before justices in Eyre was promiscuously assessed by the sheriff and barretors of the county, (for so our act speaketh) upon the faultless as well as upon the faulty, and that after the justices in Eyre were departed and gone. 2dly, That the same was many times by them increased. 3dly, That the parcels were otherwise than they ought to be, to the damage of the people. 4thly, That the said amercement was paid to the sheriff and barretors that could not acquit them, and therefore were often doubly charged. The remedy by the body of the act consisteth of two parts, First, That such sums shall be assessed by the oath of knights, and other honest men, before the justices in Eyre, upon such as ought to pay the same. 2dly, That the justices shall cause the parcels to be put in their estreats which shall be delivered up in the Exchequer, and not the whole sum. 2 Inst. 196.

Here fine and amercement are all one; for, as by this act appeareth, it ought to be assessed, which a fine in his proper sense ought not. This is parcel of the green-wax so called, because the estreats to the sheriff for levying of them are sealed with green-wax. This common amercement was a great grievance to the people; for that the faultless as well as the faulty were (as hath been said) thereby charged, and this was *Disperdere innocentem cum delinquentem*. 2 Inst. 196.

4. Affeering is by the statute of *Magna Charta*, which wills that no man be amerced but *secundum quantitatem delicti*, which cannot be known but by affeement. *Quod nota.* Br. Amercement, pl. 50. cites 10 H. 6. 7.

But where  
an amerce-  
ment is pre-  
sented by the  
jury, it shall be  
affeered by two  
affeerors. Br. Amercement, pl. 50. cites 10 H. 6. 7. per Chau-  
trel, quod non negatur.

5. Where an amercement is in nature of a fine, there shall be no affeement; as where it is assessed by stewards in a leet. Br. Amercement, pl. 50. cites 10 H. 6. 7.

6. If a juror appears, and is adjourned upon pain, and makes default, in this case he being to be fined to the value of his land by the year, the inquiry shall be by the others of the jury, because in such case the court cannot know it. 8 Rep. 41. a. in a nota of the reporter in Griesley's case, says that with this accords 4 E. 4. 6. and 9 H. 4. 5.

The jury in  
a leet must  
amerce to a  
certain  
sum, which  
may be  
mitigated  
and affeer-

7. If a jury in a leet taxes an amercement, it is sufficient without other affeement; for the amercement is the act of the court, and the affeement is the act of the jury. 8 Rep. 40. b. in Griesley's case, in a nota of the reporter, and says that with this accords 8 H. 7. 4, and cites 7 E. 3. 15. b. Astelie's case, 45 E. 3. 29. b. and 27. a.

ed by others, and therefore these offices must not be confounded; per Hobart Ch. J. Hob. 119. Pasch. 14 Jac. in pl. 166.

An amercement in a court-leet for an offence presented, need not be affeered; and Hob. 119. 125

was denied; per Holt Ch. J. Show. 62. Mich. 1 W. & M. in the case of Matthews v. Carey.— But the amercement *must not* be by the jury, but by the judgment of the court, Quod fit in misericordia; and the part of the jury is only ministerial; for they are to carry the act of the court into a certainty; per Raymond Ch. J. and judgment accordingly. Gibb. 109. Mich. 3 Geo. 2. B. R. Stephens v. Howard.—Holt said he never understood that case in Hobart 129. and that in case of an amercement in a court-baron, the certain sum need not be set by the court, but it is enough if it be ascertained by the affeerors; and Mr. Pingelly said that many authorities are otherwise. 11 Mod. 71. pl. 11. Pasch. 5 Annæ, B. R. Anon.

8. All fines in a *leet* may be assessed by the steward, and all amercements may be assessed by the affeerors; per Frowike and Kingsmill J. Kelw. 65. pl. 5. Trin. 20 H. 7. in a nota.

9. *Fines assessed by the court* shall not be affected by any others, unless in special cases, and this not only upon contempts or misdemeanors done in court, but upon writs of *capias pro fine*, or upon *confessions*, &c. 8 Rep. 40. b. 41. a. in Griesley's case, in a nota of the reporter, cites Trin. 22 H. 7. Rot. 510. and Trin. 4 H. 8. Rot. 306.

10. A fine imposed by a *steward of a court* is good enough without any affeering, and so there is a diversity between a fine and an amercement; for a fine is always imposed and assessed by the court, but an amercement is assessed by the country. Resolved per tot. cur. 8 Rep. 38. b. Trin. 30 Eliz. C. B. Griesley's case. [ 421 ]

Sav. 93. 94. pl. 173. S. C. & S. P. according-ly.—Br. Leet, pl. 29. cites 7 H. 6. 12. same diversity taken.—11 Rep. 43. b. same diversity taken per cur. and says that with this accords 7 H. 6. 12. b. and 10 H. 6. 7. a.

11. At a court baron a tenant was *presented* for an offence, and if he did not amend it before the next court, that he shall pay such a pain, and at the next court it was presented that he had not amended it, and so he has incurred the pain, this need not be affected; for there is a *diversity between an amercement and a pain*; per Anderson, quod Windham concessit. 1 Le. 203. pl. 282. Pasch. 31 Eliz. C. B. Castle v. Oldman.

12. A *by-law* was made at a court-baron, according to the custom there used, whereby the penalty of 20s. was laid upon every offender, and afterwards at another court a tenant is presented for a breach thereof, and ex gratia curiæ, the penalty was assessed to 6s. 8d. But adjudged ill; for that a penalty certain cannot be affected or altered. 3 Le. 7. pl. 21. Mich. 7 Eliz. C. B. Scarning v. Cryer. Mo. 75. pl. 205. Scarning v. Criet, S. C. accordingly. Bendl. 159. pl. 219. S. C. adjudged for the

plaintiff. — Where a fine is certain the steward may set it, and there can be no affeement; per Bridgman Ch. J. Cart. 29. Mich. 17 Car. 2. C. B. in case of Davis v. Lowden.

13. If the jury *amerce to a particular sum*, there is no need of an affeement; per Holt Ch. J. Show. 62. Mich. 1 W. & M. in case of Matthews v. Cary. Error out of the common pleas upon a

judgment in deb., for an amercement in a court-leet. The defendant made default of suit after a general notice, and the amercement affected. Per Holt Ch. J. The jury may amerce in a certain sum if they will, and then there needs not an affeement, though the proper way is *Idco fit in misericordia*, and then an affeement. 11 Mod. 76. Pasch. 5 Ann. B. R. Brook v. Hastler.—1 Salk. 56. pl. 7. Hill. 4 Annæ, B. R. S. C. that the defendant was amerced per cur. and it was objected that the court ought to impose a sum certain, which is afterwards to be mitigated by affeerors; but curia contra, and that the amercement ought to be general, Quod fit in misericordia, and that is to be ascertained by affeerors.

14. Amercements are to be affected, unless they are in nature of This seems to be the

case of Edwards v. Hughes, G. Equ. Rep. 209. which is the argument of Gilbert Ch. *of a fine*, and then they need not, but where they are *discretionary*; but if they are *ascertained by custom*, they ought not; 1st, because it is in nature of a fine for a contempt; 2dly, because the custom has ascertained it; per 3 justices against one, who thought the custom abrogated by Magna Charta, cap. 14. 8 Mod. 296. Trin. 10 Geo. 1. in the Exchequer, Morgan's case.

B. that all amercements must be affected by the statute of Magna Charta 14. and it is there added, That that was the opinion of the court, delivered by the Ch. B. Gilbert.

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(E) By whom it shall be affected.

Br. Amercement, pl. 40. cites

[ 1. ] IN an assise, if the *plaintiff does not appear, or any for him*, yet *three of the assise may be sworn to affect the amercement, and shall do it.* 28 Ass. 26. adjudged.]

S. C. and says that three were sworn to affect the amercement, and so they did; but that it was not usual to do so, and therefore quære; but says that this was the 3d or 4th writ. Quod nota.

If a man be non-suited after the jury is

[ 2. If a man be amerced upon a *nonsuit* by the bailiff of an inferior court, this shall be affected by his equals. 10 E. 2. Action sur le statute 34.]

ready to give their verdict, the court may cause the amercement to be affected immediately in court by the same jurors. 8 Rep. 39. b. in Griesley's case, cites it as so held 18 E. 3. 13. a. S. C. cited accordingly in Godfrey's case. 11 Rep. 43. b.

\* Fol. 212.

Fitzh. Amercement, pl. 19. cites S. C.

[ 3. 8 E. 1. Rot. Patentium Membrana 28, in Dorso C. de L. Assignatur ad taxandum per sacramentum proborum & legalium hominum de quolibet hundredo comitatum Somerset, Dorset, Devon, & Cornubiæ, & etiam ballivorum hundredorum, aliorum omnia amerciamenta ad quæ homines comitatum illorum amerciati fuerunt coram justitiariis nostris de Banco, annis regni nostri, 2, 3, 4, 5, & 6. et quorum nomina iidem justitarii nostri vobis liberabunt, prout hactenus fieri consuevit, & prout ad opus nostrum magis videritis expedire, & mandatur vicecomitibus comitatum prædictorum quod, &c. venire faciant coram vobis sex probos, &c.]

[ 4. If a judgment is reversed in a writ of false judgment, and the suitors amerced, the justices may affect it. 22 E. 3. 2.]

S. C. cited by the reporter in Griesley's case, 8 Rep. 40. b. and says, that with this agrees the Book of Entries, tit. False Judgment, pl. 13. S. P. D. 263. pl. 33. Trin. 9 Eliz. accordingly.

It is used to be assessed before the justices of assise, by the oaths of 2 or 3 honest men.

5. 9 H. 3. 14. A freeman shall be amerced proportionable to his offence, and saving to him his contenment, a merchant saving to him his merchandize, and a villein his wainage, and none of the said amercements shall be assessed but by the oaths of honest and lawful men of the vicinage,

Br. Amercement, pl. 65. cites 7 H. 6. 12.

This statute seems only an affirmation of the common law. 8 Rep. 39. 40. a. And see there the citations out of Glanville, Fleta, and Bracton.—2 Inst. 27. 28. S. P.

The word (*Free-man*) is to be understood a freeholder, as appears by the words (*Salvo contemento suo*) and extends as well to sole corporations as bishops, &c. as to lay-men, but not to corporations aggregate of many. Nor is the word (*Free-man*) intended of officers or ministers of justice. And this act extends to amercements and not to fines imposed by any court of justice.—S. P. 8 Rep. 39. b. in Griesley's case.

*Earls and barons shall not be amerced but by their peers, and no man of the church shall be amerced but according to their lay tenements and the quantity of his offence.*

If a lord of parliament is nonsuited after ap-

pearance, or if he be a duke, he shall be amerced to 10l. and an earl to 5l. *et qui minus minus*, per Littleton. Br. Nonsuit, pl. 62. cites 19 E. 4. 9.—Br. Amercement, pl. 47. cites S. C. but Brook says, *Quære* if an earl be not 10 marks, for it seems that the meanest, as baron, shall be amerced 100s.

• S. P. because he is a peer of the realm. Br. Amercement, pl. 23. cites 38 E. 3. 31.

Every amercement upon a baron shall be 100s. per Paston, & non negatur. Br. Amercement, pl. 2. cites 9 H. 6. 2.

A bishop shall be amerced to 100s. because he is a peer of the realm. Br. Amercement, pl. 48. cites 21 E. 4. 77.

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Though this statute be in the negative, yet *long usage has prevailed against it*, for the amercement of the nobility is reduced to a certainty, viz. a duke 10l. an earl 5l. a bishop who hath a barony 5l. &c. In the Mirror it is said that the amercement of an earl was 100l. and of a baron 100 marks. 2 Inst. 28.—8 Rep. 40. 2. S. P. accordingly.

Anciently according to this statute the counties (viz. earldoms) and baronies, were affected by their peers in parliament. Gilb. Hist. View of Excheq. 81. and says, that he conceives estreats of such misericordia's were sent to the clerk of the parliament, but by an order of the house of lords these ameracements were reduced to a certainty, that of a duke to 10l. an earl 5l. and a baron and bishop 5 marks, so that by that order ameracements becoming certain there was no occasion of sending them to the house of lords as they did formerly.

It is said, that a bishop shall be amerced for an escape 100l. A goaler shall be amerced for a negligent escape of a felon attaind 100l. and of a felon indicted only 5l. 2 Inst. 28.

If a nobleman and a common person join in an action, and become nonsuit, they shall be severally amerced, viz. the nobleman at 100s. and the common person according to the statute, therefore when a nobleman is plaintiff it is politick rather to discontinue the action than be nonsuit. 2 Inst. 28.

6. If the steward affects an amercement upon presentment of the jury, it is void, and does not bind. 8 Rep. 40. b. in Griesley's case, in a nota of the reporter, cites 45 E. 3. 27.

7. Writ of right against the earl of Northumberland after issue joined upon the mere right, after battail joined the tenant made default, and judgment final was given, and he was amerced; but because he was a peer of the realm, he was awarded to be affected by his peers according to the form of the statute of Magna Charta, cap. 14. Quod nota. And so see that after the amercement awarded the amercement shall be affected. Br. Amercement, pl. 33. cites 1 H. 6. 7.

8. Amercement assessed in bank for nonsuit or the like, shall be affected after before the justices of assise in the county where it arises. Br. Amercement, pl. 50. cites 10 H. 6. 7. per Chauntrell, & non negatur.

9. Amercement in a leet presented by the jury shall be affected by two affectors. Br. Amercement, pl. 50. cites 10 H. 6. 7. per Chauntrell, & non negatur.

Kelw. 65.  
a. pl. 5.  
Trin. 20 H.  
7. S. P. by  
Kingmill.

Frowike Ch. J. and

10. Contra of Amercement assessed by the steward in a leet by the best opinion, for this is in nature of a fine. Br. Amercement, pl. 50. cites 10 H. 6. 7.

11. There is a diversity between ameracements in actions real or personal of the demandant or tenant, &c. or upon presentment or indictment, as for not repairing a bridge or highway, &c. and the like; for such ameracements according to the stat. Magna Charta, and Westm. 1. 18. ought to be affected per pares; but ameracements of persons having administration of justice, or of any officer or minister

*minister that has execution of writs, &c. of the king; for such amercements shall be affeered by the justices or judges of the court where the cause depends. 8 Rep. 40. a. in Griesley's case, in a nota of the reporter, which see there with his reasons.*

So if a writ be delivered to the sheriff of record to be executed, & vice-

12. If the *sheriff returns Capi corpus*, and has not the body at the day, the entry is *Ideo, &c. in misericordia*, and it shall be affeered by the justices. 8 Rep. 40. b. in Griesley's case, by the reporter, and says, that with this accords the book of Entries, tit. *Capias* 19, 20.

comes *non misit breve*. Ibid. cites tit. Record. 2. — So of a *habeas corpus* directed to a sheriff, gaoler, &c. and he does not bring the body. Ibid.

[ 424 ]

• F. N. B.  
75. (I) (K)  
76. (A)

13. If demandant or plaintiff is nonsuited, or judgment given against the tenant or defendant, or against the bail for non-appearance of the principal, or against the plaintiff for not prosecuting, or *pro falso clamore*, &c. the award is, that he be in *Misericordia* generally, without taxing or assessing any sum certain, and in C. B. the clerk of the warrants makes the estreats of those amercements, and delivers them to the clerk of assize in every circuit to deliver them to the \* *coroners of the several counties to affeer*, and such assessments by them have been deemed a compliance with the statute of Magna Charta, viz. That none of the said amercements be assessed but by the oaths of honest and lawful men of the vicinage; and the coroners being elected by the whole county were thought the most indifferent. 8 Rep. 39 b. per cur. Trin. 30 Eliz. C. B. in Griesley's case.

A difference was taken Arg. between a thing done in the court,

14. It is the *common course* throughout the realm, that the amercements are *assessed by the steward in a court baron*; per cur. resolved. Cro. E. 748. pl. 1. Pasch. 42 Eliz. B. R. in case of Rowleston v. Alman.

and a thing done Out of the court; that as for a thing done in the court, the steward ought to amerce the party, but for a thing done out of the court the amercement ought to be by the homage; but it was answered of the other side, and said, that of things done out of court the amercement ought to be by the steward, but affeered by the homagers or affeers, but that 22 E. 3. St. Quintin's case is, that for things done in \* *view of the steward*, he ought to impose it, and also to affeer it. 3 Roll. Rep. 3. 4.

• S. P. of a fine, by Anderson Ch. J. Cro. E. 241. in pl. 2.

15. A common baker was amerced in a leet for selling bread against the assize. Per Hobart, they must amerce to a certain sum, which may be mitigated and affeered by others. Hob. 129. pl. 166. Pasch. 14 Jac. in case of Wilton v. Hardingham.

16. In debt for an amercement in a leet it was shewn, that it was affeered by all the jurors to 40s. Upon demurrer it was objected, that the affeement ought to be by *officers elected by the steward*, and not by the jury, and they have a special oath to this purpose, and judgment for the defendant. 3 Lev. 206. Mich. 36 Car. 2. C. B. Evelin v. Davis.



(E. 2) Affeerment. Pleadings, &c.

1. **I**N an avowry for an amercement in a leet, the defendant *alleges prescription* in the use of this assessing by the affeerors. Kelw. 65. a. pl. 5. Trin. 20 H. 7. Anon. per Frowike Ch. J. and Kingmill.

2. In *trespass* of taking a horse, &c. if the defendant *justifies for an amercement in a court leet*, and that it was affeered by 2 affeerors to so much, and that he by virtue of a precept distrained the horse within the precinct of the leet, he *ought to express the names of the affeerors*. Per cur. Kelw. 66. a. pl. 8. Trin. 20 H. 7. Anon. In debt for an amercement in a leet, the defendant demurred, because it  
was said it was affeered, but *not said by whom, nor ad eandem curiam*, which per cur. is ill; and judgment for the defendant. 3 Keb. 362. pl. 42. Mich. 26 Car. 2. B. R. Cutler v. Creswick.

3. Second deliverance upon a distress taken for an amerciament in a court leet, the parties were at *issue if C. and D. were affeerors of the court aforesaid*. Upon exception taken, the court were of opinion that it should be *tried by the record*, because a leet is a court of record. Cro. E. 860. pl. 33. Mich. 43 & 44 Eliz. C. B. Monnop v. Thomas.

4. In *trespass* of taking goods, the defendant justified for several amercements assessed in a court baron, but did *not shew any affeerment*, and upon the first argument it was adjudged for the plaintiff per tot. cur. for this cause. 3 Lev. 19. Pasch. 33 Car. 2. C. B. Conyers v. Franke.

(F) [Amercement.] In what *Actions*.

[ 425 ]

[ 1. **I**N an *attaint* against him who recovered in the first action, if the plaintiff recovers the defendant shall be amerced.]

[ 2. [So] If a man *recovers in an assise*, and dies, and his *wife is endowed*, if in an *attaint* against the wife he recovers, the *wife shall be amerced*. 40 Ass. 20. adjudged.]

3. He who brings *Scire facias, Quid juris clamat, &c.* upon matter of record shall not find pledges; for he shall not be amerced if he be nonsuited; per Fortescue. Br. Amercement, pl. 49. cites 18 H. 6. and Fitzh. Pledges 1.

4. In all *actions personal*, as *debt, detinue* and the like, without force or disceit to the court, and in all actions comprehending force or disceit to the court of record, if the *plaintiff is barred, or nonsuited, or the writ abates* for default in matter or form, he shall be amerced only and not fined. 8 Rep. 61. a. Mich. 6 Jac. in Beecher's case.

5. And in the same *actions* which are without force or fraud to the court, the defendant shall be amerced. Ibid.

(G) By

(G) *By whom Amercements may be. [And How.]*

[ 1. **T**HE justices in a special assise amerce the sheriff, if he *does not return the assise.* 7 H. 6. 13.]

The mis-  
chief before  
this statute  
was, that

2. *Marlb. 52 H. 3. cap. 18. No escheator, commissioner, or justice assigned to take assises, or to hear or determine matters, shall have power to amerce for default of common summons,*  
the escheator, sheriff, coroner, special justices of assise, and justices of oyer and terminer, in special cases (whom Britton call Simple Inquirors) would upon the common summons amerce such as made default. Now this statute takes away their power to amerce, Nullus, &c. habet potestatem amerciandi pro defaulta. 2 Inst. 136.

But this extended not to sheriffs in their tourns, nor to stewards in leets, notwithstanding that they be inquirors, for that they deal with common nuisances, or matters concerning the publick, and not in private causes, and therefore are not restrained by this statute. 2 Inst. 136.

That is  
justices of

*But the chief justices, or the justices in Eyre in their circuit.*

general assises, whose authority increasing by divers acts of parliament, and coming twice every year where the justices in Eyre came but from 7 years to 7 years, and the authority of justices in Eyre by little and little vanished. So as if any amercement is to be made for default upon common summons, upon due certificate made thereof to the justices of assise (here called Capitales Justiciarii, in respect that special justices of assise were named before) they may amerce upon such default, but the escheator dealing *virtute officii*, did after this statute certify the defaults into the Exchequer, and there was the amercement imposed; which is worthy of observation. And this exposition agreeth with Britton, who wrote soon after this statute. 2 Inst. 136.

Ibid. pl. 65.  
cites S. C.

3. Amerciaments in banco, and in all other courts shall be assessed *Per pares suos.* Br. Amerciament, pl. 25. cites 7 H. 6. 12.

Jo. 300. pl.  
3. S. C. ad-  
judged for  
the plain-

4. In *trespass*, &c. the defendant justified the taking, &c. *for that at the sheriff's tourn the plaintiff was amerced for not appearing there,* being duly summoned, and thereupon he was amerced by the jury, which was assessed by 4 of the jurors to 40s. and certified to the next quarter-sessions and there confirmed, whereupon the steward made a warrant to him to levy it. Adjudged *per tot. cur.* upon demurrer that the amerciament ought to have been assessed by the court, and not by the jury, as the defendant had pleaded, because it is a judicial act. And judgment for the plaintiff. Cro. C. 275. pl. 13. Mich. 8 Car. B. R. Griffith v. Biddle.

[ 426 ]

tiff; for  
the sheriff  
is the judge  
and the  
amerce-  
ment is by  
him, and the jurors are only assessors.

(H) *In what Cases.*

[ 1. **I**N a *formedon*, or other action, if the tenant comes the first day and renders the land, he shall not be amerced. 8 R. 2. Amercement 26. adjudged. 1 E. 3. 11. in a warranty of charters. Co. Lit. 126.]

[ 2. In dower, if the tenant renders to the demandant her dower after he hath taken a day *prece partium*, he shall be amerced, though this delay was by the assent of the demandant. 18 E. 3. 39. adjudged; but *quære.*]

[ 3. [So]

[ 3. [So] In dower, if the tenant *after he is effaigned* renders dower, and avers that he hath always been ready, &c. the tenant shall not be in misericordia. 22 E. 3. 2.]

[ Nor the demandant in this case. 22 E. 3. 2.]

[ 4. In *detinue* for a box of charters by the heir upon the delivery of his father, if the demandant comes the first day, and says that he hath been always ready to render them, and yet is, if the plaintiff does not traverse this, the defendant shall not be amerced. 38 E. 3. 20. adjudged.]

Br. Amercement, pl. 22. cites S. C. accordingly. — *Detinue* of

40 charters. The defendant denied 29, and confessed 11, and therefore was amerced, and they were at issue for the rest. Quod nota. Br. Amercement, pl. 20. cites 38 E. 3. 3.

[ 5. In a writ of dower, if the tenant vouches the heir of the baron, and the vouchee demands the lien, and upon this the vouchee enters into warranty, as he who hath nothing by descent, &c. and the tenant says that he hath assets by descent, upon which judgment is given that the demandant shall recover against the tenant, &c. the vouchee shall be in misericordia, though he doth not counterplead the warranty. 16 E. 3. Amercement 14. adjudged.]

[ 6. In a *Cui in vita*, if the tenant vouches, and the vouchee comes the first day of the summons and renders, yet he shall be amerced; for when the render is not at the first day of the original, an amercement is due to the king. 14 E. 3. Amercement 16. adjudged.]

[ 7. In an account as receiver of 10l. if the defendant pleads *Never his receiver*, &c. and this is found against him, by which he is adjudged to account, and after he comes and tenders the 10l. and swears upon a book, that after the time that the monies were delivered to him he could not find any thing to buy for profit, this shall be a good discharge of the defendant, and he shall not be amerced, nor the plaintiff neither. 46 E. 3. Accompt 40.]

[ 8. [So] In an account, if the defendant comes the first day and tenders the money, and the plaintiff accepts it, none of them shall be amerced. 2 R. 2. Accompt 45.]

[ 9. In a writ of debt, if the defendant comes the first day and appears by attorney, and makes defence, scilicet, *defendit vim & injuriam quando*, &c. and after the attorney pleads *Non sum informatus*, and thereupon judgment is given against him, and that the defendant be in misericordia, this amercement is well assessed; for when he comes the first day, if he will save his amercement, he ought to render the action to the plaintiff, and not make defence, as he hath done here. Mich. 4 Jac. B. R. between Hobberlye and Lewis, adjudged in a writ of error; but Mich. 3 Car. B. R. between Barecroft and Rookes, adjudged contra in a writ of error upon a judgment in banco, but this was not moved. Intratur Trin. 9 Car. Rot. 664. but there he came the first day by summons.]

[ 427 ]  
Fol. 213.

In debt the defendant appeared the first day of the summons, and afterwards the plaintiff recovered by Non

sum informatus, but that the defendant non sit in misericordia, because he came at the first summons; but where the defendant does not come the first day but by mesne process, there the judgment is that sit in misericordia. Yelv. 108. Mich. 5 Jac. B. R. *Difmo v. Sherley*.

[ 10. So in a writ of debt, if the defendant comes the first day, and impails till the next term, and then judgment is given upon *Non sum informatus*, the defendant shall be amerced. H. 10 Jac. B. R. between

between Dame Slaney and Vawtre, adjudged, quod capiatur; but it seems as if this was mistaken.]

[ 11. In an action of *debt* the *defendant* comes the first day by *attorney*, and says that *Non est informatus*, and thereupon judgment is given, the judgment shall be against the defendant for the debt, damages, and costs; but nihil in misericordia quia venit primo die per summonitionem, &c. Mich. 9 Car. B. R. between Barecroft and Rookes, adjudged in a writ of error upon a judgment in banco, because this is all one, as to the plaintiff, as if he had confessed the action; for he is not more delayed by this, and this is the cause of the common pleas in such cases. Intratur Trin. 9 Car. Rot. 664.]

2 Inst. 104.  
105. S. P.  
that he shall  
not be a-  
merced by  
the statute  
of Marl. b.

[ 12. In a *replevin*, if the *issue* be whether the place be *hors de son fee*, and this is found for the plaintiff, yet the avowant shall not be amerced, because the action is not founded upon the statute that wills that none shall distrain out of his fee. 28 E. 3. Amercement 24. adjudged.]

but he must have an action upon that statute.—8 Rep. 60. b. in Beecher's case, it is held that the party distrained in the highway cannot plead it in bar of the avowry, but shall be driven to his action upon the statute, in which the king shall have his fine.

S. C. cited  
by Roll. Ch.  
J. All. 74.  
75. to have  
been ad-  
judged, and  
that judg-  
ment was  
reversed  
according-  
ly.

[ 13. In an action of *debt* upon a bill, and upon an *emisset*, if the defendant as to the bill pleads *Non est factum*, and as to the *emisset* *Non debet*, and both are found against him, and judgment given against the defendant quod capiatur for denying his deed, yet judgment ought to be given quod est in misericordia, as to the *emisset*. Trin. 11 Car. B. R. between Eltonhead and Deere, resolved, and a judgment given in the Marshalsea reversed accordingly in a writ of error, because the judgment was not that he should be in misericordia for this. Intratur H. 10. Rot. 876.]

But if it  
was in the  
time of his  
feoffor or an-  
cestor, there  
the writ cannot  
be amerced. Ibid.

14. If *nuisance* be found to be done in the time of the defendant, he shall be ousted by the sheriff, and the defendant amerced. Br. Amercement, pl. 66. cites 3 E. 3. Itinere Nottingham.

nuisance shall he ousted, ut supra, without amercement; for he who is not party to the writ cannot be amerced. Ibid.

[ 428 ] 15. In *assise* in B. R. the plaintiff was *essoigned* so near the end of the term, that day could not be given in the same term, and the court was to be removed, and adjournment cannot be into another county, therefore the tenant went quit without amercing the plaintiff. Quod nota bene. Br. Amercement, pl. 36. cites 12 Ass. 27.

16. Upon *discontinuance* in real or personal action, the demandant or plaintiff shall not be amerced; for it is the act of the court. 8 Rep. 61. a. b. cites 38 E. 3. 31. a.  
And that the law is the same, and the reason the same, when the court is ousted of jurisdiction. Ibid. cites 38 E. 3. 7.

17. In all cases where the demandant or plaintiff is *barr'd*, the judgment is Quod nil capiat, &c. sed sit in misericordia pro falso clamore inde, &c. 8 Rep. 61. b. in Beecher's case.

And where  
he shall be  
found he  
shall not be  
amerced. Ibid.

18. Note, where a man is awarded to prison, there he shall not be amerced. Br. Amercement, pl. 56. cites 11 H. 4. 55.

19. Where

19. *Where a man denies his own deed which is found against him by verdict, he shall make fine and shall be imprisoned. So if he pleads false deed or release. But if he confesses the matter before verdict so that judgment is had upon his confession, in this case he shall not be amerced, and shall not make fine, nor he shall not be imprisoned. And so see that in some case a man's confession shall not be so strong against a man as verdict. Nota. Br. Confession, pl. 3. cites 33 H. 6. 54.*

20. *Decem tales returned, and the plaintiff recovered, and no manucaptores juratorum returned, and the defendant brought writ of error. Per Choke, the jury shall not be amerced upon the decem tales, therefore they need not return manucaptores any more than in venire facias upon the habeas corpora; they shall be amerced, therefore there shall be manucaptores juratorum returned. But per Littleton and Comberford prothonotary, they shall be amerced as well as in the habeas corpora. Choke said that then ought the manucaptores to be returned. Br. Amercement, pl. 30. cites 9 E. 4. 14.*

21. *In all actions real or personal, not containing any force or disceit to the court, if the tenant or defendant comes at the first day and renders the thing in demand, he shall not be amerced, because he does what the king commands by his writ; for where the writ is Præcipe quod reddat, &c. this in judgment of law is, that he render it at the return of the writ in court, and not en pais. 8 Rep. 61. b. in Beecher's case, and cites it as resolved 5 Rep. 49. a. Mich. 39 & 40 Eliz. B. R. Vaughan's case.*

*Dower against two daughters, the one pleaded in bar, upon which they are at issue, and the other pleaded that the*

*demandant detained from her a certain hamper of evidences concerning her land descended, &c. and in case she will deliver it; she is ready to render dower. And the demandant said, that she is and at all times has been ready to render the hamper, by which the demandant had judgment to recover dower against her, and neither of them was amerced. Quod nota. Br. Amercement, pl. 24. cites 21 E. 3. 9.*

*Judgment was given in a writ of partition. It was assigned for error inter al' that the defendants came and confessed the partitions, notwithstanding which it was awarded that they should be in misericordia, which should not be in this action where there is no tort objected against them, and they confess the action. The court held that if the defendants came in upon the first summons, and such judgment be given, it is erroneous; but it was alleged they came in upon the pone, and then it is good. Cro. E. 64. pl. 10. Mich. 29 & 30 Eliz. B. R. Yate & al' v. Windham.—2 Le. 2. Yate v. . . . S. C. But S. P. does not appear.*

22. *In a writ of entry in the quibus brought in Wales, the defendant pleaded Non disseisvit, and then came the general pardon of 35 Eliz. by which all fines, amerciaments, and contempts are pardoned; judgment was given against the defendant; sed non in misericordia quia pardonatur. It was assigned for error that defendant ought to have been amerced, because the general pardon did not discharge the amerciament. Resolved that judgment be affirmed, and that the original cause of the amerciament was the tort and contempt that he did not render the land to the demandant, and the original cause being pardoned the amercement is consequently pardoned also. 5 Rep. 49. Mich. 39 & 40 Eliz. B. R. Vaughan's case.*

Mo. 394.  
pl. 511.  
Hawle v.  
Vaughan

[ 429 ]

S. C. and the court inclined accordingly. —  
Jenk. 258.  
pl. 54. S. C. adjudged and affirmed in error. — Co. Litt. 126. b. S. P.

F. N. B. 73. 23. If a man be *convicted before the sheriff in recaption* he shall  
(D) S. P. be amerced. Br. Amercement, pl. 51. cites F. N. B. 73.  
but if he be convicted before the justices in such writ, he shall be fined and not amerced.—11 Rep. 41. b.  
(h) cites S. C. and S. P. of recaption before the justices, and adds, viz. in a court of record, and  
says that with this accords 9 H. 5. 1. b.—S. P. 8 Rep. 41. a. in Griesley's case, in a note of  
the reporter cites F. N. B. 73. (D).

The judgment in re-  
traxit is,  
Quod nil  
capiat per  
breve suum  
præd' sed sit in misericordia pro falso clamore, &c. 8. Rep. 62. b. in Beecher's case.

24. In case of a *retraxit* the plaintiff ought to be amerced;  
for this is a stronger case than a nonsuit, as being a voluntary  
acknowledgment that he has no cause of action. 8 Rep. 59. 2.  
Mich. 6 Jac. in the Exchequer in Beecher's case.

So in all  
the said  
writs of  
præcipe if  
judgment is  
given against  
the tenant  
he shall be  
amerced.  
8 Rep. 60. b. in Beecher's case.

25. In all writs of *præcipe quod reddat*, as writ of right, *for-*  
*medon*, *quod permittat* of estovers, common, &c. or *præcipe quod*  
*faciat*, as writ of customs and services, &c. if the *demandant* is  
*barred* or *nonsuited*, or if his writ *abates*, because it is vitious in  
matter or form, the demandant shall be amerced. 8 Rep. 60. b.  
in Beecher's case.

Lev. 286.  
S. C. and  
Twisden  
took the ex-  
ception to  
the miseri-  
cordia, be-  
cause the  
plaintiff is  
not delayed,  
the plea being a confession of the action; but the others held that it is not a direct confession, but *quasi*  
an admittance of the debt, and it was after imparlance, and they affirmed the judgment.—Sid.  
448. pl. 11. S. C. and as to the exception taken by Twisden J. it was answered that the judgment  
is well because it is according to the entries and BERGMAN'S CASE, which was as here.—  
2 Saund. 226. S. C. says judgment was affirmed as to this point upon a precedent read of a judg-  
ment accordingly in Mary Shipley's case; and that upon arguing this case in the house of lords  
where Vaughan Ch. J. supplied the place of the Ld. Keeper, it was urged that by what appears  
by the record, the defendant pleaded the very day of the declaration; to which Vaughan  
answered that then it should be entered that they *venerunt primo die*, and for want of such entry it  
shall not be intended that he pleaded the first day, and therefore shall be amerced for the delay,  
and that judgment was affirmed by the house of lords. But the reporter says, that the opinion  
of Vaughan seems to him not to be law; for in a quare impedit, if the bishop imparles and af-  
ter pleads that he claims nothing but as ordinary, whereupon the plaintiff has judgment against  
him, yet the bishop shall not be amerced because he excuses himself of tort, though he had de-  
layed the plaintiff, which he takes to be a case in point.—But there is a note in the marg.  
of 2 Saund. 227. that Cro. 93. and Hob. 200 is against this opinion of Saunders; and 1 D. 461.  
Amerciament (H) pl. 17. makes a quare of Saunders's opinion, and says he takes the law to be  
otherwise, and cites Cro. J. 63. and Hob. 200.

26. Debt was brought against N. an executor, who came in and  
pleaded *plene administravit*. The plaintiff confessed the plea and  
prayed judgment of *assets quando acciderint*. The judgment was in  
Misericordia, and the court doubted at first whether it was er-  
roneous for that cause. But because it appeared that the *executor*  
*did not come in primo die* they affirmed the judgment notwithstanding.  
Vent. 94. 96. Trin. 22 Car. 2. B. Noell v. Nelson.

## [ 430 ] (I) For what Cause. Upon Abatement of Writs.

[ 1. ] IF a writ abates by the act of God, the plaintiff or de-  
mandant shall not be amerced. Co. Lit. 127.]

[ 2. So if a writ abates without any default of the plaintiff he  
shall not be amerced. Co. Lit. 127.]

[ 3. In



[ 3. In an action brought by two, if the writ abates *by the death of one of them*, the other shall not be amerced; because it is by the *act of God* without the default of the party. \* 43 Aff. 18. adjudged. 48 E. 3. 23. Co. Lit. 127.]

Br. Amercement, pl. 12. cites S. C. & S. P. in a

warrantia chartæ.—Fitzh. Amercement, pl. 13. cites S. C. accordingly.—8 Rep. 60. b. S. P. accordingly in Beecher's case, and cites S. C. and 46 E. 3. tit. Account 40. 5 E. 3. 3. 22 H. 6. 7. 38 E. 3. 31. 7 H. 6. 36. 41 Aff. 14.

\* This seems to be misprinted; for I do not observe S. P. there.

[ 4. If two join in a personal action, and *one is nonsuit*, which in law is the nonsuit of the other, yet the other shall not be amerced, because this is not his fault. 47 Aff. 3. adjudged.]

Br. Amercement, pl. 63 cites S. C. &

S. P. in Champerty.—8 Rep. 61. a. S. P. in Beecher's case.

[ 5. In *trespass for taking his corn*, if upon the pleading the *right of the tithes comes in question*, by which the writ abates, yet the plaintiff shall not be amerced, because there is not any default in him. 38 Ed. 3. 6. 6.]

[ 6. If a writ abates *by the act of the plaintiff or demandant, or for matter of form*, the plaintiff or demandant shall be amerced. Co. Lit. 127.]

Fol. 214.

\* S. P. 8 Rep. 61. b. in Beecher's case accordingly, be it in writ real or personal.

*Debt by bill*, which was that A. B. petit 100 marks, eo quod defendens recognovit se debere 100 l. *præd'* where *libras* was not expressed before, and therefore was abated, and the plaintiff shall be amerced for ill bill, which abated. Br. Amercement, pl. 26. cites 7 H. 6. 36.

[ 7. If a writ, which is *grounded upon a record*, abates, the plaintiff shall not be amerced. Fitzh. Amercement 8.]

In all judicial process, if the writ

abates, the plaintiff shall not be amerced; because the process is founded upon a judgment, and record. 8 Rep. 61. a. in Beecher's case, cites 11 H. 4. 55. b. in quid juris clamat, scire facias, &c. 21 E. 3. 23. 9 E. 3. 32. in per quæ servitia. 18 H. 6. tit. Pledges 1.

[ 8. As if a *quid juris clamat* abates, the plaintiff shall not be amerced, because this is grounded upon a record.]

Quid juris clamat was brought by a *feme covert* without her *baron*, because the fine was levied to her when

[ 9. So if a *scire facias* abates, the plaintiff shall not be amerced. 44 Ed. 3. Amercement 8. 41 E. 3. there accordingly.]

[ 10. If a *scire facias* to execute a *fine* abates by the *plea of once executed in his ancestor*, the plaintiff shall be amerced. 30 Ed. 3. 27. b. adjudged, but *quære*.]

she was sole, and therefore the writ was abated; quod nota; and there it was agreed, that in this action, and in *scire facias*, if the plaintiff be nonsuited, the plaintiff shall not be amerced. Br. Quid juris clamat, pl. 23. cites 11 H. 4. 7.

11. *Avowry for rent*, and return was awarded, by which the defendant sued *scire facias* upon this judgment to have execution of the rent, where no judgment was given of it, but to have return, and the writ was abated without amercing the plaintiff; *quære causam*, whether because it was a *judicial writ*, or because it was abated by the law. Br. Amercement, pl. 57. cites 21 E. 3. 23.

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12. *Trespass between an abbot and prior* for corn, the defendant justified for *tithes*, and therefore the court was ousted of jurisdiction, and the plaintiff not amerced, for no default in him. Br. Amercement, pl. 21. cites 38 E. 3. 7.

13. *Quare impedit* abated by these words, *ut dicitur*, where it should be *ut dicit*, the plaintiff being an earl shall be amerced at 100 s. and therefore he discontinued the process; quod nota; because he is a peer of the realm. Br. Amercement, pl. 23. cites 38 E. 3. 31.

(K) Upon a *Nonfuit*.

In all judicial process, if the plaintiff be nonsuited, he shall not be amerced, because the process is founded on a judgment and record. 8 Rep. 61. a. Mich. 6 Jac. in Beecher's case.

[ 1. **I**N a writ founded upon a record, if the plaintiff be nonsuit yet he shall not be amerced. 11 H. 4. 7.]

Br. Amercement, pl. 16. cites S. C. & S. P. by Skrene and Hanke.—Ibid. pl. 49. cites 18 H. 6. S. P. by Forcue.—Fitz. Amercement, pl. 7. cites S. C. accordingly, and that for the reason in pl. 1. supra.

[ 2. *As in a quid juris clamat*, if the plaintiff be nonsuit yet he shall not be amerced. 11 H. 4. 7. per Skrene.]

Br. Amercement, pl. 16. cites S. C. & S. P. by Skrene and Hanke.—Br. Amercement, pl. 40. cites 18 H. 6. S. P. by Forcue. And Fitz. Pledges 1.—Fitzh. Amercement, pl. 8. cites 44 E. 3. that in scire facias the writ was abated, and the plaintiff was not amerced, and says, that 41 E. 3. is accordingly.

[ 3. So if the plaintiff in a *scire facias* to execute a fine be nonsuit, the plaintiff shall not be amerced. 11 H. 4. 7. per Hank. 30 Ed. 3. 27. b.]

The plaintiff was nonsuited in 3 assises the one after the other, by which the court amerced him to 5 marks for the vexation; quod nota. Br. Amercement, pl. 31. cites 9 E. 4. 33.

4. In *assise*, the plaintiff was nonsuited when the jury returned to give their verdict, and was amerced to a mark. Br. Amercement, pl. 37. cites 22 Ass. 32.

5. Note, per Browne, that if two bring an *action real*, and the one is nonsuited after appearance, he who is nonsuited shall not be amerced. Br. Amercement, pl. 3. cites 38 H. 6. 11.

6. If the demandant or plaintiff is nonsuited in any *action* (certain special cases excepted) the judgment is *Ideo consideratum est quod præd' quer' & plegii sui de proseguendo sint in misericordia, &c.* 8 Rep. 61. b. in Beecher's case.

[ 432 ] (L) What Persons shall be amerced. [ *Infant.* ]

S. P. Arg. 2 Le. 4. in pl. 4.—Ibid. 185. in pl. 231.

[ 1. **A**N infant being plaintiff or demandant shall not be amerced, and this is the reason that he shall not find pledges. Co. Litt. 127.]

—S. P. 8 Rep. 61. b. in Beecher's case, and this is by reason of the imbecility of the age; but the entry is *Ideo in misericordia, sed pardonatur quia infans*, cites 43 Ass. 45. and several other books.—Palm. 513. Hill. 3 Car. B. R. In case of Young v. Young, it was agreed by all that an infant shall not find pledges, because it shall not be intended that they sue out of malice, and cites 44 Ass. 55. accordingly; but that there it is said, *Ideo in misericordia, sed pardonatur quia infans*; but says this is not so, but the use de misericordia est nihil quia infans, and infant shall not be amerced; and cited Fitzh. Amercement 10. and Infant 14. and Co. Ent. 226. to the same purpose.

[ 2. In

[ 2. In a *quare impedit* against an infant, if the plaintiff hath a writ to the bishop, the infant shall be amerced. 44 Ed. 3. Amercement 10.]

[ 3. An infant defendant shall be amerced if he pleads with the demandant, and the matter is found against him. 9 H. 6. 7. Dubitatur 2 Ed. 3. 32.]

See pl. 5. and the notes, and see pl. 8.—  
Judgment in

dower was given against an infant, who appeared by guardian. The record certified that the defendant was in misericordia. It was assigned for error, that being an infant he ought not to be amerced. The record was amended by rule of court, and made nihil in misericordia quia infans. Cro. C. 41c. pl. 5. Trin. 11 Car. B. R. Smith v. Smith.

[ 4. If an infant in reversion be received, and pleads in bar, and this upon demurrer is adjudged against him by the court, he shall not be amerced. Dubitatur 38 Ed. 3. 33. per curiam.]

[ 5. So if an infant be attainted of a disseisin, he shall not be amerced. 43 Ass. 45. adjudged.]

Br. Cover-  
ture, pl. 43.  
cites S. C.

that the amercement shall be pardoned, because he is an infant.—Br. Amercement, pl. 43. cites S. C. accordingly.

[ 6. If an infant brings an action, and the matter is found against him, he shall be amerced. 17 Ed. 3. 7. 5. b. Contra D. 17 Eliz. 338. 41.]

[ 7. [So] If an infant brings an action, and this is abated for his infancy, he shall be amerced. 41 Ass. 14.]

Br. A-  
merce-  
ment, pl.

61. cites S. C. of an appeal brought by him, says he was amerced, but that it was pardoned for his infancy.—Br. Fine for Contempts, pl. 37. cites S. C. that the infant was amerced, but did not make fine.—See pl. 8.

[ 8. But when an infant is amerced, he shall be pardoned of course. 17 E. 3. 75. b. adjudged \* 30 Ass. 18. 41 Ass. 14 † 43 Ass. 45. adjudged 44 Ed. 3. Amercement 10.]

\* Fitzh.  
Imprison-  
ment, pl.  
10. cites  
S. C. &

S. P. admitted, but he was awarded to be imprisoned.

† Br. Imprisonment, pl. 75. cites S. C. & S. P. accordingly.—Bulst. 172. but false paged (162). cites S. C.—See pl. 5. in the notes there.

[ 9. If an infant brings an action by *prochein amy*, and pending the action comes of full age, and makes an attorney, and after is nonsuit, he shall be amerced. D. 17 Eliz. 338. 41 curia.]

5 Rep. 49.  
a. cites S. P.  
adjudged  
accordingly  
in a præcipe

quod reddat in C. B. Mich. 15 & 16 Eliz.—Co. Litt. 126. b. 127. a. S. P. accordingly.—Mo. 394. pl. 511. S. P. cited by Tanfield, as Mich. 15 & 16 Eliz.—Roll. Rep. 294. S. P. cited by Coke Ch. J. as held about 16 Eliz. that if the judgment had been given against him during his minority he should not be amerced, and so if he had confessed the action as soon as he came of full age; but if he postpones it, and does not do it as soon as he is of full age, he shall be amerced.—3 Bulst. accordingly by Coke Ch. J.—S. P. accordingly; otherwise if he had been an infant when he was nonsuited.—Jenk. 253. pl. 54.—See pl. 13. S. P.

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[ 10. If an infant brings an action of trespass by guardian against two, and the defendant pleads Not Guilty, and at the nisi prius the plaintiff appears in person, and a verdict is found for the plaintiff for part, and Not Guilty for the rest, and one of the defendants Not Guilty, and judgment is given for the plaintiff for that for which the verdict is given for him, and quod nil capiat per billam for the rest, and as to him that is found Not Guilty, sed nihil de misericordia.

*miser cordia pro falso clamore, &c. Quia querens tempore \* transgressione predicta facta, infra etatem existeret, yet this is good, and no error. Trin. 11 Car. in Camera Scaccarii, between Methwold and Anguish, adjudged in a writ of error, and the first judgment given in the King's Bench affirmed, notwithstanding I urged this to be an error, and they took a diversity between this and a nonsuit.]*

F. N. B. 31. [11. The king being plaintiff or demandant shall not be  
(F) S. P.— amerced. Co. Litt. 127.]  
Ibid. 101.

(A) S. P.—S. C. & S. P. cited accordingly, Br. Amercement, pl. 53.—S. C. & S. P. cited 8 Rep. 61. b. in Beecher's case, and this by reason of the dignity of his person.

Br. Am- [12. The queen, the wife of the king, shall not be amerced.  
mercement, pl. Paich. 13 E. 1. B. Rot. 52. where the judgment is against the  
53. S. P. queen, and in misericordia nihil, eo quod consors regis.]  
cites New

Nat. Brev. 101.—S. P. 8 Rep. 61. b. in Beecher's case, accordingly; for in this respect she participates of the prerogative of the king.—Co. Litt. 127. a.—She is a person exempt. Br. Nonability, pl. 59. cites 18 E. 3. 12.

S. P. cited [13. If a *præcipe* is brought against an infant, and pending the  
by Tanfield plea he comes of full age, he shall be amerced for the delay after he  
as Mich. 15 comes of full age. Mich. 15, 16 Eliz. B. adjudged. Quod vide.  
& 16 Eliz. Co. 5. in Vaughan's case, 49.]  
Mo. 394. in the case  
of Hawle v. Vaughan.—See pl. 9. S. P.

14. In quare impedit, if a lord of parliament, as *duke, earl, baron*, or other *peer* of the realm, is nonsuited in action after appearance, he shall be amerced. Br. Amercement, pl. 47. cites 19 E. 4. 9.

## (L. 2) Of whom. Sheriffs and Officers.

1. [N affise a bailiff, who had returned *villeins*, was amerced, and Non omittas awarded. Quod nota bene. Br. Amendment, pl. 39. cites 26 Aff. 28.]

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Br. Process, pl. 31. cites S. C.—  
Br. Return de Briefs, pl. 31. cites S. C.

2. Exigent against J. N. the father, and the son who was of the same name rendered himself, and the sheriff returned reddidit se, and the plaintiff said that he who appears is another person, and not the defendant, by which the sheriff was amerced, and distringas ad habendum corpus issued against him, by reason that he returned reddidit se, where he who appeared is another person. Br. Amercement, pl. 14. cites 7 H. 4. 11.

3. The sheriff returned cepi corpus, and at the day had not the party at the bar, but protection was cast for him, and yet the sheriff was amerced for his false return. Br. Amercement, pl. 18. cites 11 H. 4. 57.

4. Where a sheriff returns 7 d. in issues upon distress, he shall be amerced, because it is less than costs of the writ, which is 13d. Br. Amercement, pl. 27. cites 19 H. 6. 8. per Fortescue.

5. In debt the sheriff returned quarto exactus upon exigent, the plaintiff

plaintiff averred, that the defendant is outlawed, and had *certiorari* to the coroners, who certified, that he is outlawed, and the sheriff was amerced 50l. Br. Amercement, pl. 32. cites 36 H. 6.

24.

6. If the sheriff returns no year upon the serving of proclamations upon exigent, and mistakes the county, as T. sheriff of K. where it should be sheriff of L. he shall be amerced, and this in the same term that he made the return; for in another term after he shall not be amerced. Br. Amercements, pl. 1. cites 27 H. 8. 29.

Br. Retorn de Briefs, pl. 3. cites S. C. per Fitzherbert J. for clear law, quod non negatur.

7. The sheriff returned a *non est inventus* upon an attachment awarded against W. who is a justice of peace, and as the plaintiff was informed, was at the last quarter sessions holden for the county, and for this the sheriff was amerced 5l. Cary's Rep. 62. Anno 2 Eliz. Stradling v. Pembroke (Earl of).

8. The sheriff cannot be amerced for returning too small issues; for it lies not in the conscience of the court whether they are too small or not, but the party is put to his averment; per Coke Ch. J. Roll. Rep. 336. Hill. 13 Jac. B. R. Goats's case.

9. The sheriff is to be amerced for the faults of his own bailiffs, for the sheriff is the officer to the court, and not they. L. P. R. 71. cites Hill. 22 Car. 1. B. R.

10. If the sheriff be amerced by the court for the not doing a thing belonging to his office, and yet he continues to neglect to do it, contrary to the rule of this court, the court may encrease the ameracements upon him until he perform his duty therein; for the greater the offence is, the greater the punishment ought to be. L. P. R. 71. cites Trin. 23 Car. 1. B. R.

11. Amercements set upon the sheriff upon the motion of the party, if they be not estreated into the Exchequer may be with a *respectuatur*, that is, be respited if the party grieved, who caused him to be amerced, will consent thereunto, otherwise it cannot be; for though the ameracements be due to the king, yet they were set upon the sheriff for an injury done to the party. L. P. R. 71. cites Trin. 23 Car. 1. B. R.

12. The sheriff of York was amerced for not returning a writ of *habeas corpus cum causa*, though he was commanded not to do it by the bishop then president there. L. P. R. 71. cites 14 E. 3. Crompt. Jurisd. p. 78. [b]

13. A sheriff, nor any other person out of his office, cannot be amerced by the court, for then he is not an officer to the court; but a *distringas* must issue out against him, to distrein him and make him come in; for he is not now counted present in court as when he was sheriff, or other officer. L. P. R. 71. cites Mich. 23 Car. 1. B. R.

14. It is the constant practice for sheriffs to take bail bonds according to 23 H. 8. from persons taken up upon attachment, and no remedy against him upon a *cepi* returned, if he has him not at the day, but to amerce him. Per cur. 12 Mod. 557. Mich. 13 W. 3. Sheriff of Cumberland's case.

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(M) *Who shall be amerced.*

\* This is misprinted, and should be pl. 14.

—Attaint passed against the

*baron and feme*, and therefore they were amerced and taken. Br. Amercement, pl. 9. cites 42 E. 3. And Brooke says, and so see that feme covert may be amerced.

\* This is misprinted, and should be pl. 14.

[ 1. ] *If baron and feme are vouched as in the right of the feme, and judgment is given against him, and the feme is to be amerced, they shall be amerced, though the feme be within age, the husband being of full age. 16 Ed. 3. Amercement \* 16. adjudged.]*

[ 2. *And this amercement shall not be pardoned of course. 16 Ed. 3. Amercement \* 16. adjudged.]*

Hob. 127.

pl. 159.

Mich. 12

Jac. S. C. &

S. P. admit-

ted.—

Brownl. 16. S. C. accordingly.—Mo. 869. pl. 1206. S. C. admitted accordingly.—S. C. cited accordingly. Cro. J. 633. in pl. 5.—See tit. Amendment (F) pl. 9. S. C.—See (Q) pl. 4.

Fitzh.

Amercement, pl. 19.

cites S. C.—S. C. cited by the reporter in Griesley's case. 8 Rep. 40. b.—The suitors were amerced. D. 263. a. pl. 33. Trin. 9 Eliz. Anon.—They shall be amerced to the end they may be more wary, and take better advice to do justice. 2 Inst. 196.—Mod. 249. pl. 7. Trin. 29 Car. 2. C. B. Anon. the suitors were amerced.

[ 5. If he in *reversion* prays to be *received* upon the default of the lessee, and *loses by plea*, he shall be amerced. 38 Ed. 3. 33. admitted.]

[ 6. In an *attaint*, if *lessee* for life hath *aid of him in reversion*, and they *join and lose*, he in *reversion* shall be amerced as well as the lessee. 40 Ass. 20. adjudged.]

Cro. C. 564.

pl. 9. Mich.

15 Car. B. R.

Proctor v.

Chamber-

laine, S. P.

in error of

a judgment

in C. B. and

error was

assigned,

because it

was in

misericor-

dia against

the 4 where

3 of them

never ap-

peared, and

that against

him who ap-

peared no

misericordia

ought to be,

because he

came in upon

the day of

summons; and

for this and

other reasons

it was resolved,

that he that

appeared (being

taken in execu-

tion) should be

discharged.

\* 9 E. 3. cap. 3.

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Roll. Rep.

293. Hill.

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[ 8. In an action of *trover* and conversion against *baron and feme* for the conversion of the feme during the coverture, if the

*feme*



*feme* be found Guilty by verdict, and the *baron* Not Guilty, yet both shall be in misericordia, for the amercement is not for the conversion, but for the *delay of the suit*, and the non-rendering the first day, of which the baron is as well guilty as the feme. Mich. 15 Jac. B. R. between Wood and his wife against Sutcliffe, per curiam the judgment reversed. Hill. 13 Jac. B. R. accordingly, per curiam.]

13 Jac. S. C. & S. P. and judgment for reversal nisi such a day, at which day the reporter says nothing was said,

and therefore he believes that judgment was reversed.—Cro. J. 439. pl. 12. Mich. 15 Jac. B. R. S. C. and judgment reversed accordingly, it being only that the wife sit in misericordia.—3 Bulst. 150. S. C. and S. P. agreed, per tot. cur. and judgment reversed.

[9. In a writ of *dower*, if the *tenant* vouches the *baron* and *feme* as in the right of the feme, as heir to the husband of the demandant, and the vouches demand the lien, upon which the lien is shewn, and they enter into (\*) warranty as those who have nothing by descent, and the tenant says, that they have by descent, upon which judgment is given against the tenant, &c. the feme only shall not be amerced without the baron, but both. 16 E. 3. Amercement 14. adjudged.]

Fol. 216.

10. In *detinue* the defendant prayed garnishment against W. and had it, and at the day the plaintiff and defendant made default, and W. appeared, and recovered the writing by award, and the plaintiff and defendant were amerced, and a distringas awarded against the defendant to deliver the writing. Br. Amercement, pl. 6. cites 40 E. 3. 39.

11. A man recovered in *assise*, and died, and his feme was endowed, and attain was brought against the feme, who prayed aid of the heir, and had it, and they joined and lost the land, by which both were amerced. Quod nota. Br. Amercement, pl. 64. cites 42 E. 3. 26.

12. Note that a *baron* shall not plead nor be impleaded by name of Baron, but by name of Knight or Esquire, and yet he shall be amerced in the Exchequer as a baron; for baron is not a name of dignity. Quod nota. Br. Amercement, pl. 52. cites 32 H. 6. 30.

13. Debt by a bishop and J. S. as executors of J. N. the defendant waged his law, and if he performs it, then the bishop shall be amerced to 100s. because he is a peer of the realm, by which he was nonsuited, and severed, and the other appeared, and the defendant did his law, and so the amercement of the bishop saved. Br. Amercement, pl. 48. cites 21 E. 4. 77.

(N) In what Cases where the Defendant [\* or one of the Defendants] is found Guilty of Part.

\* See pl. 1, 2, 3, 4. and see (Q).

[1. In a writ of forcible entry against several, for entering with force and holding out with force, if some are found guilty of the forcible entry, and not guilty of the holding out with force, the plaintiff shall be in misericordia for this. 19 H. 6. 32.]

Br. Amercement, pl. 28. S. C. accordingly. Trespass

against 2 for chasing in his park at D. who pleaded Not Guilty, and the one was found guilty at sub a day

to the damages of 30 s. and the other guilty at another day to the damage of 13 s. It was awarded, that the plaintiff should be amerced, because he is acquitted of the trespass done in common with the other. Br. Trespass, pl. 58. cites 47 E. 3. 10.

Br. A-mercement, pl. 28. S. C. accordingly. \* [ 2. So if some are found guilty of the holding with force, and that they entered peaceably, the plaintiff shall be amerced for this. 19 H. 6. 32.]

*Affise against A. and B. it is found that B. disseised the plaintiff and infeoffed A. and that A. did not disseise the plaintiff, there the plaintiff shall recover, and yet shall be amerced for his false plaint, and yet he cannot do otherwise, but to say that both disseised him; quod nota.* Br. Amercement, pl. 34. cites 7 Aff. 14. — Br. Affise, pl. 123. cites S. C. [ 3. If a man brings an *affise* against the tenant and disseisor of a rent-service, and the tenant is acquitted, and the disseisor found guilty, the demandant shall be amerced for the tenant. 17 E. 3. 46. b. adjudged.]

Br. A-mercement, pl. 42. cites S. C. and says, that [ 4. So in an *affise* of a rent against one tenant and two disseisors, if he recovers against the tenant and one disseisor, and the other is acquitted of the disseisin, the demandant shall be amerced for him. 31 Aff. 31. adjudged.]  
so it is in all cases, unless where the plaintiff is an infant, or the like. If part be found for the plaintiff or demandant, and part against him, he shall recover and be amerced as to the other. — S. C. cited 8 Rep. 61. a. — Br. Amercement, pl. 27. cites 19 H. 6. 8.

*Affise said, that the plaintiff was seised and disseised, but not of so much land as was put in the plaint, but he was disseised of so much as he put in view, by which he recovered by award without amercing the plaintiff; quod nota; for the surplusage in the plaint he was not amerced.* Br. Amercement, pl. 35. cites 12 Aff. 14. [ 5. In an *affise* for several rents, if the defendant be found a disseisor of one rent, and not of the other, the plaintiff shall be amerced for this rent, of which no disseisin is committed. 17 E. 3. 75. b. adjudged.]

[ 6. In an account upon a receipt of parcel by another's hand, of which the defendant traverses the receipt, upon which they are at issue, and of the other parcel upon a receipt by the hands of the plaintiff himself, to which the defendant wages his law, so that the plaintiff takes nothing by his writ as to this, but is in misericordia. 14 Ed. 3. Amercement 17. adjudged. And in this case though the inquest after pass against the defendant for the residue, yet he shall not be amerced. 14 Ed. 3. Amercement 17. per Shard.]

7. *Trespass* of 300 fish to the damage of 10 l. the jury found upon the issue four fish, and but 8 d. in damages, by which the plaintiff recovered and was amerced pro falso clamore. And so see that where any part is found against the plaintiff, he shall be amerced. But the reason why the plaintiff was amerced, was supposed to be because he counted of 300 roches and perches, and the jury found but four roches, quod nota; for he shall not be amerced because the jury found less damages than the plaintiff counted, for this is very often used without any Amercement. Br. Amercement, pl. 27. cites 19 H. 6. 8.

(O) In what Cases where the Judgment is given against the Defendant for Part.

[ 1. ] In an action of *covenant for several covenants broke*, if the plaintiff be *barred for one* he shall be amerced for this, though he recovers for the other. Trin. 4 Jac. B. R. between Waffel and Yelfon agreed.]

Roll. Rep. 411. pl. 54. S. C. & S. P. obiter per Coke quod fuit concef-

sum per G. Crooke and several clerks.——In *debt*, the defendant was acquitted of part, and for the rest the plaintiff recovered, and there was no judgment. Quod querens fit in misericordia; and for this cause judgment was reversed. Cro. E. 699. pl. 12. Mich. 41 Eliz. B. R. Luffer v. Legar. —Ibid. says that another judgment at the same time was reversed for the same cause between Chesold v. Wyatt.——S. P. accordingly by Glyn Ch. J. 2 Sid. 137.

[ 2. In an action upon the *case* upon a promise to do two things, scilicet, to pay so much for certain lands sold, and if the vendee sells it again for more than he paid, to pay so much more; and the defendant pleads in bar a release, which is adjudged no bar for part (scilicet, for the last sum) and a bar for the first sum, he shall be in misericordia for this sum of which he is barred, though it be an intire promise, and he could not have an action but upon both parts, for he might have acknowledged himself satisfied of that which he had released. Trin. 14 Jac. B. R. between Waffell and Yelton.]

Roll. Rep. 411. pl. 54. S. C. adjournatur.—— 3 Bulst. 230. Elkin v. Waffell, S. C. adjudged, and affirmed in error.——

[ 3. In trespass against two, if one be found guilty to [the] damage [of so much] by himself, and the other is found guilty to [the] damage [of so much] by himself, in this case each defendant shall be amerced severally, and the plaintiff shall also be severally amerced against each of them. Co. 5. Specot's case, 58. b.]

In false imprisonment, where the defendant justifies for several causes, and

some of them are found good and others not, the defendant shall not be amerced for this falsity; for there was good cause for the arrest, and this is only a defence and not by way of action as an avowry is. Jenk. 184. pl. 87.——See (T) pl. 3. S. C.——And see (Q) pl. 5. and the notes there.

4. In debt of 40l. against executors, who pleaded fully administered, and it was found that they had in their hands the day of the writ to the value of 20l. by which the plaintiff recovered 20l. and as to the other 20l. the plaintiff was amerced. Br. Amercement, pl. 29. cites 21 H. 6. 41.

Br. Executors, pl. 76.

5. In ejectment of a manor, and carrying away the plaintiff's goods, the ejectment was found, but nothing was found as to the goods being carried away. The plaintiff had judgment to recover the land, and the book says Nota, that the plaintiff ought to be amerced pro falso clamore as to the goods carried away whereof nothing is found, &c. D. 89. a. pl. 111. Trin. 7 E. 6. Clifford v. Warren.

6. In trespass of goods carried away, part was found for the plaintiff, and part against him. Adjudged in B. R. that the plaintiff recover for part, and be in misericordia pro falso clamore for the residue; and upon error brought in the Exchequer Chamber the judgment was affirmed. Mo. 692. pl. 956. Palmer v. Sherwood.

7. In

But in trespass or other actions wherein the plaintiff declares ad damnum, if less be found than he declares for, the plaintiff shall not be amerced because the action is grounded upon an uncertainty. Ibid.

7. In debt upon the statute 33 H. 8. of buying pretended titles, the plaintiff demanded 50 l. for the value of the land, and the jury find the value 20 l. the plaintiff had judgment to recover one moiety of the 20 l. and the queen the other, but no judgment was for the residue of the 50 l. viz. that the plaintiff should be in misericordia pro falso clamore, and therefore judgment was reversed. Cro. E. 257. pl. 34 Mich. 33 & 34 Eliz. B. R. Savery v. Tey.

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8. In an action against a hundred on the statute of Winton, the defendants were found guilty as to part, and quoad residuum Not Guilty, and judgment for the plaintiff for so much as is found for him, and that defendants sit in misericordia; and quoad residuum that querens nil capiat, &c. & sit in misericordia. And held well, and the plaintiff well amerced for his false prosecution; and judgment affirmed. Cro. J. 348. pl. 1. Trin. 12 Jac. B. R. Oldfield v. the Hundred of Witherly.

9. Case for that the defendant being master of a ship sailing in the Thames, did so negligently govern the same that it violenter rucbat on the plaintiff's boy loaded with goods, and floating at anchor there, and broke and drowned it ad damnum, &c. Upon Not Guilty pleaded, the jury found that quoad the negligently governing the ship, and so in the very words of the declaration, that the defendant is guilty, and assess damages to 50 l. & quoad residuum de præmissis Not Guilty. And judgment was given as to that quoad præd' the plaintiff sit in misericordia pro falso clamore; but there being no residuum of which the defendant could be found guilty, the judgment against him pro falso clamore was reversed. Raym. 390. Trin. 32 Car. 2. B. R. Mustard v. Harnden.

Fol. 217.

(P) In what Cases where the Defendant is found guilty of Part, or is adjudged guilty upon Demurrer.

Hob. 180. pl. 216. S. C. does not appear. — 2 Bulst. 326. S. C. but not S. P. — Roll. Rep. 264. pl. 37. S. C. but not S. P. — Cro. J. 439. pl. 11. S. C. but S. P. does not appear. — Jenk. 336. pl. 77. S. C. but not S. P.

[ 1. ] In trespass for a battery and imprisonment, if the defendant pleads to issue for part of the matter and time, for the rest pleads a special justification, upon which the parties demur, and this is adjudged against the defendant, and the plaintiff comes & statetur se ulterius nolle prosecute as to the issue, yet he shall not be amerced for this, because he hath judgment against the defendant for part. Trin. 15 Jac. between Evelyn and Sloley, adjudged at Serjeant's-Inn in a writ of error and the judgment affirmed.]

Herne was of taking two disses for several causes. Issue was joined as to one and found for the plaintiff, and a noli prosecute entered as to the other. Herne the secondary said the practice was in such case, to enter it without a misericordia; and so was the opinion of the court, but time was given to search for precedents. 2 Sid. 136. Hill. 1658. B. R. Young v. Wakeman. — Beecher's case in 8 Rep. was strongly objected in this case; but it was answered that the noli prosecute in that case was entered for the whole, which in this case it was not. Ibid.

[ 2. In

[ 2. In an action upon the *case for saying*, the plaintiff was a *strong thief*, if it be found that the defendant said *all the words but* the word (*strong*) and that he did not say this, the plaintiff shall have judgment upon the words found, and shall not be amerced for the word (*strong*.) Dubitatur D. 6 E. 6. 75. 22.]

[ 3. In an action of *waste in domibus & gardino*, if upon the writ of enquiry of waste the defendant be found guilty in *domibus*, and not guilty in *gardino*, the plaintiff shall be in misericordia for the garden. 14 E. 3. Waste 27.]

S. C. cited Cro. C. 453. pl. 24. Hill. 11 Car. B.R. in case of King v.

Fitch, and admitted by Berkley J. But he said that where waste is assigned in cutting down 20 trees, and the waste is found in cutting down of 2 trees and so varies only in quantity, it is otherwise. But Jones and Crooke doubted thereof.

In trespass for *killing two deer* in his park, the defendant was found guilty of one only and acquitted of the other, and therefore the plaintiff was amerced to 100s. he being a lord. Br. Amercement, pl. 2. cites 9 H. 6. 2. Ld. Fitzwater's case.

[ 4. In trespass for the *battery of his servant*, and the taking of his timber, if the defendant be found guilty of the taking of the timber, and not guilty of the battery of the servant, the plaintiff shall be amerced for this. 22 Aff. 76. adjudged.]

[ 440 ] Trespass for assault and battery, and the defen-

dant pleaded Not Guilty, and the assault found against him to the damages of 20 marks, and as to the battery Not guilty, and therefore the plaintiff recovered 20 marks for the assault and was amerced for the rest, and barred. Br. Trespas, pl. 40. cites 40 E. 3. 40. — Br. Amercement, pl. 7. cites S. C. and S. P. accordingly.

5. In all actions real and personal, if part be found for the demandant or plaintiff, and part against him, the demandant or plaintiff shall be amerced, unless no default be in him. 8 Rep. 61. a. Mich. 6 Jac. in Beecher's case.

6. In case for disturbing him of his common, the jury found that the plaintiff had a less quantity of common, and fewer acres than he alleged. Judgment was Quod defendens sit in misericordia, and also the plaintiff in misericordia pro falso clamore, &c. for that land which is found against him. This was assigned for error, and that he ought not to be in misericordia; for that it is not material. But Doderidge and Chamberlaine held it to be no error; for he having declared falsely, though he has cause to recover, he shall be in misericordia, because his complaint was false in some part; but Lea Ch. J. doubted; but afterwards judgment was affirmed. Cro. J. 629, 630. pl. 2. Hill. 19 Jac. B. R. Eardley v. Turnock.

Palm. 269. Yerly v. Turnock, S. C. says, that Lea Ch. J. at another day agreed to the opinion of Doderidge and Chamberlaine, and judgment affirmed. — 2 Roll. Rep. 252. [but it is wrong

paged, and should be 232, and there is another 252.] S. C. but S. P. does not appear.

(Q) In what Cases, where one Defendant is found guilty, and the other not.

See (N) pl. 1, 2, 3, 4.

[ 1. ] In an assise against two, if it be adjudged against one upon his plea, and the demandant releases his damages, and hath judgment presently for the land against him, relinquishing his suit against

\* Fitz. Amercement, pl. 9. cites S. C.

accordingly. *against the other, he shall not be amerced for the other.* 44 Aff. 33.

—*Affise* \* 44 E. 3. 24. adjudged.]

*against baron and feme and others.* The baron and feme pleaded a record, and the plaintiff denied it, and they failed at the day, and the other pleaded to the affise by bailiff, and the plaintiff before trial against the other at his prayer, and upon damages released had judgment against the baron and feme alone upon the failure of the record, and the plaintiff not amerced against the other. Br. Amercement, pl. 10. cites 44 E. 3. 24.—S. P. Br. Amercement, pl. 62. cites 44 Aff. 33.

\* Br. Amercement, pl. 62. cites S. C. accordingly.

[ 2. In process against several, and one is found guilty, and the plaintiff prays judgment against him, relinquishing his suit against the rest, he shall not be amerced for them. \* 44 Aff. 33. † 44 E. 3. 24.]

† Fitzh. tit. Amercement, pl. 9. cites S. C. accordingly.

8 Rep. 61. a. in Beecher's case, S. P. accordingly, and says that in all actions real

[ 3. In trespass against several for a battery, if one defendant be found Not Guilty, and the rest guilty, yet the plaintiff shall be amerced as to him who is found Not Guilty. 22 Aff. 76.]

[ 441 ] and personal, where all or part is

[ 4. In trespass against baron and feme, supposing that they both committed the trespass, if the feme be found guilty of the trespass before coverture, but the baron Not Guilty, the plaintiff shall not be amerced quoad the baron; for the baron ought to be named for conformity. \* 22 Aff. 87. adjudged; (but nota, the baron is supposed a trespasser.) ]

found against one tenant or defendant, and nothing or part only against the other, the demandant or plaintiff shall be amerced, unless no default be in them; for in the case of battery brought against the baron and feme, the plaintiff can have no other writ in such case, and consequently no default in him, and cites 22 Aff. 8. 7 Aff. 14. 31 Aff. 31. 21 H. 6. 41. 2. 40 E. 3. 40. 2.

\* Fitzh. Amercement, pl. 23. cites S. C. accordingly.—Br. Amercement, pl. 38. cites S. C. accordingly.—Fitzh. Briefe, pl. 761. cites S. C. but the point of amercement does not appear there.—See (M) pl. 3.

Cro. C. 54, 55. pl. 8. Player v. Warn & Dews, in the Exchequer Chamber, S. C. reports that there was one, and only one misericordia against the plaintiff pro falso clamore suo.

[ 5. In trover and conversion of 1000 load of coal against 3 persons, if one of the defendants is found guilty of 100 load, and not guilty of the rest, and another guilty of 100 load, and not guilty of the rest, and the 3d guilty of 100 load, and not guilty of the rest, in this case the plaintiff shall not be amerced against any of them, because each of them is found guilty of part, though severally. Mich. 2 Car. between Warne and others, plaintiffs, and Player, defendant, adjudged in a writ of error in Camera Scaccarii, this being assigned for error, Mr. Litt. being of counsel in the case.]

And the error assigned was, that there ought to have been several judgments of ideo in misericordia against the defendants, and it being otherwise is error. But resolved that there shall be but one judgment only of misericordia, though the defendants are severally found guilty, and that so are the precedents, and thereupon judgment was affirmed. [But no objection appears there to have been made as to the amercement of the plaintiff.]

Fol. 218.

(R) In what Cases, where the Recovery is against one, and not against the other.

A writ of entry in the quibus was brought against the

[ 1. ] In an affise against two, if the plaintiff recovers against one, and the other is found Not guilty, the plaintiff shall be amerced as to him. 23 Aff. 18. adjudged.]

mother



mother, and her son an infant, and it was found that the mother disseised, but that the son did not; and judgment was that petens in misericordia pro falso clamore against the son. D. 312. pl. 85. Trin. 12 Eliz. Anon.

(S) At what Time.

[ 1. ] **I**N an *account*, if the *defendant* be *adjudged to account*, judgment shall be presently, *before the final judgment*, Quod sit in misericordia, quia non prius computavit. Mich. 14. Jac. B. R. Parrey's case, adjudged in a writ of error, and affirmed by the clerk to be the course.]

[ 2. And in this case, if he be *after found in arrearages*, judgment shall be *again* Quod sit in misericordia. Mich. 14 Jac. B. R. Parrey's case, adjudged.]

3. In *assise* the *defendant* made *default the first day*. The assise shall be awarded by his default; and if it remains for *default of jurors*, yet they shall not be amerced, because it is *at the first day*; but habeas corpora shall be awarded. Br. Amercement, pl. 41. cites 30 Ass. 17.

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(T) *How* it shall be assessed. Where two Amercements. The Defendant shall *not* be amerced *twice in one Action*. See (S) pl. 2.

[ 1. ] **I**N a *quare impedit*, if the *plaintiff* recovers the presentation against the defendant, and thereupon judgment is given upon demurrer to have a writ to the bishop, and upon this the defendant is amerced, and *after a writ is awarded to inquire of the damages*, and the other points of the writ, and found accordingly, and judgment also given for this, the defendant shall not be amerced again. Co. 5. Specot 58. b.]

Hill. 32 Eliz. B. R. in error out of C. B. — 3 Le. 198. pl. 251. in C. B. the S. C. but S. P. does not appear.

—And. 189. pl. 225. S. C. but S. P. does not appear. — Goldsb. 35. pl. 10. & 52. pl. 1. S. C. but S. P. does not appear. — Jenk. 259. pl. 55. says this amercement is not double, but a repetition of the former.

[ 2. In one action against the *same defendant* or tenant, if the defendant or tenant *pleads one plea to part, and another plea to the rest, or confesses part, and pleads to issue for the other, and several issues are found against him*, yet the defendant or tenant shall not be twice amerced. Co. 5. 58. b.]

5 Rep. 58. b. in Specot's case, says that with this accords 9 E. 3. 6. per Herle, and 22 H. 6.

[ 3. In *trespass* against two, if one be found guilty to [the] damage [of so much] by himself, and the other found guilty to [the] damage [of so much] by himself, in this case each defendant shall be severally amerced, and the plaintiff also shall be severally amerced against each of them. Co. 5. 58. b.]

See (Q) pl. 3. S. C. — 5 Rep. 58. b. in Specot's case, says that

this appears in 47 E. 3. 20. — But see (Q) pl. 5. and the notes there. — If there are 20 issues, and found for the defendant, yet there shall be but one misericordia; per Glyn Ch. J. 2 Sid. 137. Hill. 1658.

4. In

Comb. 353. says that the authorities cited for the 6th resolution [which seems to

mean this paragraph in the case, there being only 4 resolutions properly so called] in Beecher's case, 8 Rep. 61. do not warrant that resolution.

In *dower* the defendant confessed as to part, and judgment

4. In all cases real or personal, when there is but one tenant or defendant, he shall not be twice amerced; but where there is but one demandant or plaintiff, and divers defendants, the plaintiff may be amerced several times. 8 Rep. 61. a. in Beecher's case, cites 9 E. 3. 6. 31 Aff. 31. 21 H. 6. 41. a. 40 E. 3. 40. a.

5. When a man confesses the action as to parcel, and denies the rest, which is found against him, he shall not be twice amerced, but once amerced only. Br. Amercement, pl. 56. cites 11 H. 4. 55.

quod sit in misericordia; and as to the rest be plead, in bar, and upon demurrer judgment is given against him quod sit in misericordia; and this was objected in error that a man ought not to be twice amerced in the same action; sed non allocatur; for both judgments are final, and independent

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of one another, but otherwise where one judgment is interlocutory only, and dependent on another, as quod computet in account. 1 Salk. 54. Hill. 7 W. 3. B. R. Ld. Gerard v. Lady Gerard.——3 Lev. 401. S. C. but S. P. does not appear.——Skin. 592. pl. 6. Lady Gerard's case. S. C. & S. P. and judgment affirmed per tot. cur. For the 2d amercement was for a new delay.——1 Salk. 253. pl. 3. S. C. & S. P. and judgment accordingly.——12 Mod. 84 S. C. but S. P. does not appear.——Comb. 352. S. C. and judgment accordingly.——Ld. Raym. Rep. 72. S. C. & S. P. and judgment accordingly. And so judgment given in C. B. was affirmed.

6. Debt brought [part] upon a lease, and part upon a buying, &c. and they were at issue upon the lease, and as to the rest the defendant tendered it, and the plaintiff received it, and therefore took nothing by his writ for this part, and was amerced, and it is said, that if the lease be found against him, he shall be amerced again; but 9 E. 3. per Herle, judgment ought not to have been given till the issue had been tried; for the defendant shall not be twice amerced, and then judgment shall be given for both. Br. Amercement, pl. 17. cites 11 H. 4. 55.

7. The plaintiff may be amerced twice in one action, as where the Lord Fitzwater brought trespass against two for hunting and killing two deer, and one acquitted, and the other found guilty of killing one only, and he was amerced 100 s. against him who was acquitted, and another 100 s. against the other on his acquittal as to the other deer. Br. Amercement, pl. 2. cites 9 H. 6. 2. Lord Fitzwater's case.

Br. Fine for contempt, pl. 29. cites S. C. and same diversity.

8. Note, where a sheriff had two exigents against one upon *capias utlagatum* upon condemnation, and *supersedeas* comes to him before the 5th county held, and yet he returned the party outlawed, and also returned two copies of the exigents, and not the very writs of exigents by which he was amerced to 20 l. for the one return, and 20 l. for the other, and to 30 l. for the falsity of the return of the one copy, and to so much for the return of the other copy, viz. 100 l. for all. \* And by the justices, that which is so assessed upon a minister of the court is called an Amercement, and not a fine. But where a stranger to the court makes a misprision, and shall make amends, there that which is assessed upon him is called a fine, and not an amercement. Br. Amercement, pl. 45. cites L. 5. E. 4. 5.

Ibid. 186. in pl. 231.——Error was

9. It was admitted, arg. that the defendant shall be but once amerced in one action for one default, but said, that if there are many defaults,

defaults the defendant shall be amerced severally for the *several* defaults for every offence. 2 Lc. 4. 5. Mich. 31 & 32 Eliz. in pl. 4. brought upon judgment in an account,

error was assigned, because upon the first judgment quod computet, it was entered *Defendens in misericordia*, and upon the 2d judgment also *Defendens in misericordia*, and so twice punished, but that was not allowed, because there were 2 several judgments, and Manwood said, that so it was adjudged between Brown and Marsh. Noy 134. Brown v. Barwick.

10. *Ejectment against four of 20 acres; three are found Guilty of 10 acres, and Not guilty of the rest, and the fourth is found Not guilty generally.* Judgment was, that the plaintiff, quoad the three pro falso clamore for so much as they were acquitted of, & pro falso clamore against the fourth be in misericordia. Error was assigned, that there ought to be two amercements. The prothonotaries said, that the usual course is to make entries in such manner, but that sometimes they find them made thus, viz. that quoad the three for so much whereof they are acquitted sit in misericordia, and as to the fourth quod sit in misericordia. Cro. C. 178. pl. 1. Hill. 5 Car. B. R. Deckrow v. Jenkins.

(U) What Court may impose it.

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[ 1. *A Court leet may impose a fine upon an officer, if he will not do his office upon command.* 7 H. 6. 12. b.] Br. Amercement, pl.

25. cites S. C. but S. P. does not appear.—Ibid. pl. 65. cites S. C. but S. P. does not appear there.—As if bailiff will not return a precept when the steward commands him. Br. Leet, pl. 29. cites S. C.—Ibid. pl. 14. cites S. C. & S. P. accordingly.

2. A fine is assessed by the *justices or steward of the leet, coroner, escheator, &c.* Br. Amercement, pl. 25. cites 7 H. 6. 12. Ibid. pl. 65. cites S. C. that

it is by the *judge of the court*.—Br. Fine for Contempts, pl. 18. cites S. C. & S. P. as to the steward of a leet; for a fine is always assessed by the discretion of the justices; and Brooke says it seems there that coroners and escheators may assess a fine upon the sheriff for not returning a panel.

3. For *conviction in recaption in a court of record* the party shall be fined, but if in a court baron it shall be only an amercement. Br. Fine for Contempts, pl. 60. cites F. N. B. 73 (D)

4. If any contempt or *disturbance* to the court be committed in any court of record, the judges may impose on the offenders a reasonable fine, and a leet being such court, and the steward judge there, he may impose such fine on such offenders. 8 Rep. 38. b. Resolved per tot. cur. Trin. 30 Eliz. C. B. in Griesley's case.

5. Courts which are *not of record* cannot impose a fine, nor commit any to prison. Resolved per tot. cur. 8 Rep. 38. b. Trin. 30 Eliz. C. B. in Griesley's case. S. P. 11 Rep. 43. b. accordingly.

Mich. 12 Jac. in Godfrey's case.—Godb. 381. pl. 467. Pasch. 3 Car. B. R. Waterman v. Cropp, S. P.

6. C. prescribed to have a *water-court* within his manor of Gravesend, and that they have used there to *inquire of* all mis-orders and *misdemeanors of watermen there*, and to have the fines and amercements of the same court. One of the jury there sworn refused

refused to give his verdict, whereupon the steward amerced him 20s. The question was, what court this was? and whether the steward could assess a fine? Adjournatur. Le. 216. pl. 299. Mich. 32 & 33 Eliz. C. B. Ld. Cobham v. Brown.

\* S. P. per Coke Ch. J. Roll. Rep. 74. Mich. 12 Jac. in case of Bullen v. Godfrey.—And Ibid. 35. in S. C. Coke Ch. J. says, that the Leet is the only court, the

7. Some courts may *\* fine but not imprison*, As the Leet; some *cannot fine nor imprison, but amerce*, As the county-court, hundred, court-baron, &c. for no court can fine or imprison which is not a court of record; some *may imprison but not fine*, As the constables at petty-sessions for an affray made in disturbance of the court; some *cannot fine, imprison, nor amerce*, As the ecclesiastical courts held before the ordinary, archdeacon, &c. or their commissaries, and such as proceed according to the canon or civil law; and some *may fine, imprison, and amerce*, as the case requires, As the courts of record at Westminster and elsewhere. 11 Rep. 43. b. 44. 2. Mich. 12 Jac. says it was observed in Godfrey's case.

Phoenix, as he calls it, which can fine, and yet cannot imprison.—4 Inst. 84. cap. 8. cites it as adjudged 3 Jac. in the Exchequer, in Sir Tho. Thimblethorp's case, and afterwards in Waller's case, that the Chancery had not power to assess a fine for not performing a decree.

And it

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seems he has a discretionary power either to award a fine or an amercement

8. The *sheriff in his tourn* may impose a fine on all such as are guilty of any *contempt in the face of the court*; for he still continues a judge of record; and there seems to be no doubt but he may impose what reasonable fine he thinks fit upon a *suitor refusing to be sworn*, or upon a *bailiff refusing to make a panel*, &c. or upon a *tithingman neglecting to make his presentment*, or upon a *juror refusing to present the articles wherewith they are charged*, or upon a *person duly chosen constable refusing to be sworn*. 2 Hawk. Pl. C. 58. cap. 10. s. 15.

for contempts to the court, and says, that there seems to be no doubt but that the sheriff in his tourn might *as common law*, as the steward of a court leet still may, award an amercement of any person indicted for any offence not capital within his jurisdiction, without any further proceeding or trial, and the statute of 1 E. 4. cap. 2. clearly supposes him to have had a power of imposing such fines. 2 Hawk. Pl. C. 58. cap. 10. s. 17.

9. O. was fined by the *council of the Marches of Wales* for refusing to appear to a bill there. Per Coke Ch. J. *no English court* can fine, and though Mountague Serjeant urged, that their instructions gave them a power to fine, yet Coke said, it is clear that they cannot, this being only a *non-feasance*, but if it had been after sentence it had been something; besides, O. being imprisoned for non-payment brought a hab. corpus, the return whereof was not that they used to fine before the statute which confirmed the court, and therefore the court held it clear that it was not good. Roll. Rep. 339. pl. 56. Hill. 13 Jac. B. R. Oliver's case.

10. *Admiralty court*, which is *no court of record*, may punish one that resists the process of their court, and may fine and imprison for a *contempt* to their court acted in the face of it; but should they proceed to give the party damages, a *prohibition* would be granted. Vent. 1. 20 Car. 2. B. R. Sparkes v. Martin.

(W) Fine for a Contempt. In what Cases for suing in Contempt of the Court.

[1. IF one man arrests another in London coming to the common pleas to answer a writ at the suit of the same man, because he ought to have his privilege, the plaintiff shall be fined for the contempt to the court. 9 H. 6. 55. curia.]

Br. Fine for Contempts, pl. 1. cites S. C.—

pur Contempts, pl. 24. cites 14 H. 7. 7. S. P. accordingly.—8 Rep. 60. a. in Beecher's case, cites S. C. accordingly, and 9 H. 6. 55.

So where an attorney arrested J. S. in the country, and when J. S. came to London he arrested him again in London for the same debt. Anderson told him that if one be sued here for a debt, and is after arrested in another court for the same debt, the penalty is fine and imprisonment, and that is both the law and custom of this court, and they committed him to the Fleet. Goldsb. 30. pl. 5. Mich. 28 & 29 Eliz. Anon.—And in Beecher's case, 8 Rep. 60. a. it is resolved 7thly, and laid down as a rule, That where any one uses the countenance of the law (which was instituted to make an end of controversies and vexation) for double vexation, he shall be fined.

[2. But if another man had arrested him, who was not plaintiff in the writ in banco, he should not be fined. 9 H. 6. 55. Curia.]

[3. If the plaintiff in a suit in banco be arrested at the suit of the defendant in London, before the return of the writ in banco, this is a contempt to the court, and for this he shall be fined and imprisoned. 11 H. 6. 22.]

Br. Fine pur Contempts, pl. 56, cites S. C. and is that the

plaintiff was coming towards the court of C. B. to prosecute his action, and the defendant arrested him in London, and the defendant was fined and imprisoned for his contumacy to the court.—Fitzh. Fines, pl. 13. cites S. C.

4. In trespass the defendant was returned Nihil, whereupon the plaintiff came to London to sue out another capias, and the defendant arrested him in London, and the plaintiff brought writ of privilege, by which the body of the plaintiff and the cause was removed. The plaintiff prayed to be dismissed, and that the defendant be fined for the arrest pending this suit; but denied per cur. For it may be that the defendant had no conusance that plaintiff had a suit against him in C. B. but otherwise it would be if the process had been served upon the defendant, because this, as it seems, is conusance. But if the plaintiff pending his suit had arrested the defendant in London, he should be fined; for he had conusance of his own suit. Br. Fine for Contempts, pl. 40. cites 4 E. 4. 15.

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(X) Who shall be fined.

[1. IN an action upon the statute of Marlbridge, for driving a distress out of the county, if the defendant justifies as bailiff to J. S. by special matter, and it is adjudged against him, he shall be amerced; for though he justifies as bailiff, yet this is not proved. 30 Aff. 38.]

Fol. 219.

Br. Trespas, pl. 255. cites

S. C. & S. P. but says that the defendant shall be ransomed, and that a capias was awarded against him.

him.—And the Year-book says the court doubted whether he should be ransomed, or only amerced by the statute; and that it was awarded by Shard. by assent of all the other justices, that he be ransomed, because he could not prove that he was bailiff, but rather the reverse.—See (D. a) pl. 1, 2, S. C.

Br. Trespass, pl. 255. cites S. C.—(D. a) pl. 2. S. C. [ 2. But *otherways* it had been if J. S. had been a party to the writ. 30 Ass. 38.]

### (Y) For what Causes a Fine may be imposed.

[ 1. *A* Court that hath power to fine may command the people to keep silence, upon a pain. 7 H. 6. 12.]

Br. Leete, &c. pl. 14. & 29. cites S. C.— [ 2. A court leet may command the bailiff to execute his office, as to make a pannel upon a pain, and if he doth it not, he shall forfeit it. 7 H. 6. 12. b.]

S. C. cited and agreed per tot. cur. 8 Rep. 38. b. in Griesley's case.—So if a sitting-man refuses to make presentment in a leet, the steward shall impose a reasonable fine upon him. Ibid. per cur. cites 10 H. 6. 7. a.

Br. Fine for Contempt, pl. 18. cites S. C.— [ 3. If a juror at the bar will not swear, he may be fined. 7 H. 6. 12. b.]  
—If a juror in a leet departs without giving verdict, the steward shall fine him. 8 Rep. 38. b. per cur. cites Lib. Intrat. in Amercement in Debt, fol. 149.

Br. Fine for Contempt, pl. 32. cites S. C. [ 4. If any of the jury give their verdict to the court, before they are all agreed of their verdict, they may be fined, 43 Ass. 10.]

[ 447 ] [ 5. In trespass, if the defendant pleads the release of the plaintiff, he shall not be fined to the king, because this is not any confession of the trespass. 11 H. 6. 29.]

S. P. and so of an accord with satisfaction, which is not a denial of the trespass, the defendant shall not make fine; for where the defendant pleads in bar, there the king shall not have fine; but contra of a release made after verdict. Br. Fine for Contempts, pl. 41. cites 4 E. 4. 29.

6. *Vouchee comes by covin* of the demandant, and therefore he was attached, and confessed it, and made fine. Br. Fine for Contempts, pl. 54. cites 22 E. 3. Fitzh. Voucher, pl. 133.

7. *Bailiff convicted for distraining vi & armis, where no rent was arrear, or the like*, shall be fined; otherwise if the lord himself was so convicted; for Non ideo puniatur dominus per redemptionem. Br. Fine for Contempts, pl. 48. cites 30 Ass. 28.

8. A jury was put in a house to treat of the issue; the 12th man went away, and could not be found; and upon informing the court thereof, another was sworn and added to the other 11, and when the 12th came he was awarded to prison, and made fine. Br. Fines for Contempts, pl. 53. cites 34 E. 3. Fitzh. Office of Court, pl. 12.

A juror was indicted for taking twelve marks for bringing sworn and to deliver a thief indicted of felony, and the juror was fined to the king. Br. Fines for Contempts, pl. 33. cites 40 Ass. 43.



10. *Lord of a leet* made a fine of 40s. because *his steward took indictment of the death of a man in his leet*, which did not belong to his leet, and so incroached upon the king; and *also took indictment of robbery at D. where there is no such vill in this county*, but in another. Br. Fine for Contempts, pl. 49. cites 41 Aff. 30. Br. Fine for Contempts, pl. 36. S. P. cites 3 H. 7. 1.

11. If one be by mainprise and fails at the day, and the *mainpernors come by capias or voluntarily*, they shall be fined. Br. Fines for Contempts, pl. 1. cites 2 H. 4. 14. S. P. where judgment is given against the defendant, but in such case the mainpernors shall not be condemned in the sum; but otherwise if they give security for the sum in demand, as upon issue upon cap. ad satisfaciendum or the like. Br. Fine for Contempts, pl. 57. cites 11 H. 6. 31.

12. One was *mainpernor for the defendant in appeal of death*, and the *defendant did not come*, and exigent upon process issued against the mainpernor, whereupon he rendered himself and made fine, and had a superedeas; quod nota. Br. Fine for Contempts, pl. 10. cites 8 H. 4. 7.

13. One who offered himself to be *pledge for another for the peace*, swore he could expend 40s. a year, and upon another examination confessed he could expend but 20s. a year, and was sent to the Fleet till he had made fine; quod nota. Br. Fine for Contempts, pl. 20. cites 7 H. 6. 25.

14. In trespass, *several were condemned*, and the *plaintiff said that one of them was in the hall*, and prayed to have an officer to bring him in, and had one, *who upon the shewing of the plaintiff arrested W. N.* at whose request he tarried with him till he had a writ of privilege out of B. R. and then he carried him to C. B. but the court was up before his return thither, and then he *let him go at large*; out per cur. he is not chargeable as for an escape, as a sheriff should be that takes a man by writ, because he has a prison to keep him in, and the writ ascertains the person whom he is to take, whereas here he was informed only by the party without any record, and if the party when he comes into court will deny his being the same person, they ought to let him go, though they know him to be the same person, their knowing him being not as judges of record; but they were of opinion that the cryer should be fined for his delay and demeanor. Nota. Br. Fine for Contempts, pl. 4. cites 33 H. 6. 55. [ 448 ]

15. If a *felon reads as clerk*, and the arch-deacon or *ordinary refuses him*, he shall be fined. Br. Fine for Contempts, pl. 7. cites 34 H. 6. 49. S. P. for he is not judge of him but the justices are his judges. Br. Fine for Contempts, pl. 43. cites 9 E. 4. 28. — Ibid. pl. 37. S. P. and cites S. C. — S. P. and so for admitting felon as clerk who is not clerk. Ibid. pl. 27. cites S. C.

16. A *juror made fine to a year's value of his land*, because he *appeared and was challenged and tried in*, and made default when he should be sworn. Br. Fine for Contempts, pl. 28. cites 36 H. 6. 27. But the demanding of him upon pain must be at the prayer of

the party, and not otherwise. Br. Fine for Contempts, pl. 42. cites 4 E. 4. 35.

17. If the *sheriff or his bailiff serves a writ every man is bound to aid him*, and this by the common law, and if they do not, being requested

requested by the sheriff, they shall be fined; as if the sheriff *requires them to take a felon*, and they refuse, they shall make fine. Br. Fine for Contempts, pl. 37. cites 3 H. 7. 1.

S. P. and so if he takes a bill before verdict given.

Ibid. pl. 61.

cites 36 H. 6. — D. 55. b. pl. 10. Trin. 35 H. 8. S. P. as to eating, &c. admitted. — Ow. 38. Trin. 30 Eliz. in Calton's case such jurors as had eat were fined 5l. and committed to the Fleet.

Sav. 93. pl. 173. S. C. and adjudged good.

18. A juror that eats and drinks before the evidence be fully given, shall be fined; so if he eats or drinks in the house before or after they are agreed of their verdict. Br. Fine for Contempts, pl. 25. cites 14 H. 7. 30.

19. The homage at a court leet time out of mind had elected a constable, and because J. S. was elected according to the custom for the next year, and refused to take the oath, and departed in despite of the court, the steward fined him 5l. and resolved good, and that without any affecting. 8 Rep. 38. Trin. 30 Eliz. C. B. Griesley's case.

20. A fine assessed by a steward in a court leet for not coming to court and doing suit, is not warrantable without a presentment that he ought to do suit at court; but in such case he shall rather be amerced than fined. For Anderson said that for such offences as are within the consance of the steward as judge, and of which he hath the view, he may assess a fine; but not of others, unless presented, & non constat to the steward if resident or not, or what cause he had for his absence. Cro. E. 241. pl. 2. Trin. 33 Eliz. C. B. Hall v. Turbet.

21. If the tenant or defendant *relieta verificatione cognoscit actionem*, he shall be fined for his falsity. 8 Rep. 60. a. Mich. 6 Jac. in the Exchequer in Beecher's case.

## (Z) In what Actions a Man shall be fined by Judgment.

Br. Fine for Contempts, pl. 15. cites

12 H. 4. 6. and 15. S. P. by Hull clearly. — 2 And. 160. S. P. Arg.

[ 1. A Man shall not be fined in an *Audita querela*. 12 H. 4. 15. b.]

[ 449 ] [ 2. In an action upon the statute of Marlebridge for driving a distress into another country, the defendant shall be ransomed (which admits that this shall be fined.) 30 Aff. 38.]

See (D. a) pl. 1. 2 —

Br. Trespas, pl. 255. cites S. C. — 2 Inst. 106. S. P. as of a thing done against the peace. — Br. Fine for Contempts, pl. 30. cites 30 Aff. 28. but it is misprinted and should be (38.) and so are the other editions.

Br. Fine for Contempts, pl. 46. cites S. C. —

S. P. is affise, [gene-

rally as it seems;] but otherwise if the disseisin be found without force; for there he shall be only amerced; for the writ of assise does not mention vi & armis, but *injuste & sine judicio disseisina*.

8 Rep.

[ 3. In an assise of a rent, if the tenant be found guilty of a disseisin with force, by reason of a rescue made by him, without vi & armis, he shall be fined, though this be not within the statute. 33 H. 6. 20. b.]

3 Rep. 59. b. Mich. 6 Jac. in the Exchequer, per cur. in Beecher's case, cites S. C. — S. P. accordingly, by reason of the force; and if the defendant brings *certificate of assise, which is returned Tardis*, yet *capias pro fine* shall issue. So if the defendant brings *atteint*; but contrary upon writ of error. Br. Fine for Contempts, pl. 46. cites 33 H. 6. 21.

[4. 10 E. 1. Rot. Finium Memb. 9. Fine taken for not prosecuting an appeal, &c.]

5. He who is outlawed upon indictment of trespass at the suit of the king, shall make fine and ransom. Br. Utlagary, pl. 37. cites 22 Aff. 47.

6. A man shall be fined in *maintenance*. Br. Fine for Contempts, pl. 21. cites 19 H. 6. 4.

7. *Justicies of trespass* lies without *vi & armis*, and therefore fine shall not be made there; contra in writ of trespass *vi & armis*. Br. Fine for Contempts, pl. 52. cites 8 E. 4. 15. per Littleton.

8. In *Quo warranto* if a man makes default, whereby issues *venire facias*, and he makes default at the day, the liberty shall be seised for ever; per Catesby. But he held that no *capias pro fine* should issue, because non constat whether he had it by right or by wrong; but by Choke J. it shall be intended now that he had it by wrong, since he does not come to shew his title, and therefore *capias pro fine* shall issue. Quære. Br. Fine for Contempts, pl. 23. cites 15 E. 4. 7.

9. In actions in which the offence is supposed with force, or in deceit of the court, if the defendant confesses the action at the first day, yet he shall be fined and imprisoned; for his appearance and confession is a manifestation of, and no satisfaction for, his offence. 8 Rep. 61. b. Mich. 6 Jac. in Beecher's case.

10. The defendant was outlawed upon an information for seducing a young gentleman to marry a young woman of a lewd character, and fined 5000*l.* It was moved that he could not be fined upon the outlawry, because in misdemeanor the outlawry does not enure as a conviction for the offence, as it does in felony or treason, but as a conviction of the contempt for not pleading, which is punishable by a forfeiture of his goods and chattels; and if he might be fined now, he must be fined again on the principal judgment, and it was held irregular. 2 Salk. 294. 1 W. & M. B. R. The King v. Tippin.

11. After a *capias utlagary* returned *non inventus*, the court may set a fine upon the party absent. Cumb. 36. Mich. 2 Jac. 2. B. R. The King v. Whitacre.

(A. a) For what Causes a Man shall be fined. [450]

[1. IN an action, if a man denies his deed, and this is found against him by verdict, he shall be fined for his falsity, and the trouble to the jury. Co. 8. Beecher, 60. \* 33 H. 6. 54. b. curia, † 9 E. 4. 24. D. 3 E. 6. 67. 19. admitted. 7, 8 El. 245. 65. ‡ 34 H. 6. 20. adjudged.]

Bull. 230. S. P. admitted by judgment, Pasch. 12 Jac. Jones v. Cross. — See (G. 1) pl. 1. S. P. Br. Amercement, pl. 56. cites 11 H. 4. 55. S. P. accordingly. — 2

\* Br. Fine for Contempts, pl. 3. cites S. C. & S. P. agreed.—Br. Amercement, pl. 5. cites 33 H. 6. 50. accordingly.—Fitzh. Fines, pl. 16. cites 33 H. 6. accordingly.

† Fitzh. Fines, pl. 25. cites S. C. accordingly.

‡ Br. Fine for Contempts, pl. 3. cites S. C.—Fitzh. Pledges, pl. 3. cites S. C.

He who *denies the deed of his ancestor*, which is found against him, *shall be amerced*; but if it was his *own deed*, he *shall be fined*. Br. Amercement, pl. 5. cites 33 H. 6. 50.—But where a man *denies his own deed*, so that he is convicted of it, and awarded to prison for the denying, there he shall not be amerced; for where a man shall be imprisoned, he shall not be amerced. Br. Amercement, pl. 17. cites 11 H. 4. 55.

See (G. a) [ 2. So in an action of debt, if the defendant pleads the acquittance  
pl. 2.— of the plaintiff, and the plaintiff denies it, and this is found for him  
In this case, by verdict, the defendant shall be fined for his falsity, as well as if  
and the case above, he he had denied his own deed. 33 H. 6. 54. b. curia. Co. 8.  
should be Beecher, 60.]  
fined and

imprisoned; but in either case if after his plea he confesses the matter, he shall be amerced only; for the judgment is only upon the confession, and the plea is waived. Br. Amercement, pl. 5. cites 33 H. 6. 50.—Br. Fine for Contempts, pl. 3. cites S. C.—Fitzh. Fines, pl. 16. cites S. C. & S. P. per Prisot; quod fuit concessum, by the prothonotaries.

In debt the defendant pleaded the plaintiff's release, and the plaintiff denied it to be his deed, and it was found *Not his deed*. The judgment was *Quod sit in misericordia*, and not *Quod capiatur*; but all the justices and barons held it well enough, because it was the deed of another which he pleaded; so that though it be false, he shall not be imprisoned; but otherwise where he denies his own deed; and judgment affirmed. Cro. E. 844. pl. 31. Trin. 43 Eliz. in the Exchequer-chamber, Walker v. Hancock.

As where an attain varies from the first record in the name of the plaintiff, [ 3. If a writ abates through the default of the plaintiff himself, he shall be fined. 34 Ass. 9.]

[ 4. As if a writ abates for that the plaintiff or defendant is misnamed, the plaintiff shall be fined; for this is his own fault. 34 Ass. 9. adjudged.]

this being his own default he shall be fined. But per Shard. it is otherwise if it be not by his own default. Br. Fine for Contempts, pl. 30. (bis) cites 54 Ass. pl. 9. but it seems misprinted for (34 Ass. pl. 9.) and so are the other editions.

\* Br. Fine pur Con- [ 5. If the plaintiff be nonsuit, he shall be fined. \* 34 Ass. 9.  
tempts, admitted † 41 Ass. 8.]

pl. 30. (bis) cites S. C. & S. P. accordingly.  
Fitzh. Corone, pl. 219. cites S. C.

† Br. Appeal, pl. 74. cites S. C.—

[ 6. If a writ abates for want of form, the plaintiff shall not be  
Fol. 220. fined. 34 Ass. 9. For this is not the fault of the plaintiff.]

Br. Fine for Contempts, pl. 30. (bis) cites 54 Ass. 9. per Shard.; but seems misprinted for 34 Ass. 9. and so are the other editions.

[ 451 ] [ 7. So if a writ abates for want of matter in law. 34 Ass. 9.]

Br. Fine for Contempts, pl. 30. (bis) cites 54 Ass. 9. by Shard. but should be 34 Ass. 9. and so are the other editions.

Fitzh. Co- [ 8. In an appeal of mayhem against several, if some of them are  
rone, pl. found guilty, and the plaintiff prays judgment against them, and re-  
182. cites linquishes his suit against the rest, he shall be fined for his not pro-  
S. C. ac- ceeding against the rest. 22 Ass. 82, adjudged.]  
cordingly.  
—Br.

Appeal, pl. 60. cites S. C.

9. If one denies his tally of debt sealed, he shall not make fine as he shall upon denying his deed. Br. Fine for Contempts, pl. 51. cites 4 E. 2. Fitzh. Fine 115 & 116.

10. If

10. If a man *at a justice seat* makes a false claim by claiming more than he ought, he shall be fined for such false claim. 4 Inst. 297. cap. 73. cites 8 E. 3. Itin. Pick. fol. 15. Lanc. fol. 64.

11. For all contempts done to any court of record against the command of the king by his writ under his great seal, the offender shall be fined and imprisoned, As in Quare non admisit, Quare incumbravit, Attachment upon prohibition, &c. 8 Rep. 60. a. in Beecher's case, cites 19 E. 3. Quare non admisit 7. 23 E. 3. 22. 26 E. 3. 25. 20 E. 2. Corone 233. Standf. 132.

12. But when the tenant or defendant *se retraxit or recessit in contemptum curiæ*, this is not any contempt against the command of the king by his writ. 8 Rep. 60. a. b. in Beecher's case.

13. In appeal of mayhem, by which he lost his hearing, it appeared upon examination that he is not maimed, but can hear very well, and therefore shall be fined for his false appeal. Br. Fine for Contempts, pl. 12. cites 8 H. 4. 21.

14. If the defendant in replevin claims property falsely, and this be found in a proprietate probanda, he shall be fined and imprisoned. Br. Fine for Contempts, pl. 14. cites 11 H. 4. 4.

Br. Return de Brief, pl. 108. cites S. C. accordingly. — Br. Property, &c. pl. 14.

15. But otherwise where a servant claims property for his master, and the property is found against him, there the master shall not be fined. Br. Fine for Contempts, pl. 14. cites 11 H. 4. 4.

cites S. C. accordingly. — Fitzh. Proprietary Probanda, pl. 1. cites S. C. that the defendant in replevin claimed the property to be in his master, whereupon a writ of proprietary probanda was awarded as it was said; and Huls said, that if the property be found in the plaintiff, the defendant shall be fined, &c. — 8 Rep. 60. a. in Beecher's case, S. P. that he shall be fined and imprisoned.

16. In replevin the defendant avowed for damage feasant, and found for the avowant, and upon a Returno habendo and an Averia elongata returned, and a Withernam awarded, the plaintiff on bringing the money into court prayed stay of the Withernam; but the whole court was clear against it, because the plaintiff having *essoigned the cattle*, which is a contempt, ought to pay a fine, and assessed a fine accordingly, and then the plaintiff had his prayer. 2 Le. 174. pl. 211. Mich. 29 & 30 Eliz. C. B. Anon.

17. If two are fighting, and others are looking on, who do not endeavour to part them, and one is killed, the lookers-on may be indicted and fined to the king; per Popham, quod Yelverton concessit. Noy 50. Wilburn's case.

S. P. accordingly, 3 Inst. 53. cap. 7. that if those that are present

when any man is slain do not their best endeavour to apprehend the manslayer, they shall be fined and imprisoned.

18. In debt by an executor, the defendant pleaded a release of the testator made to himself, but found against him, and judgment in misericordia. Error was brought, because it ought to be a capitatur, he having pleaded a false deed. [No judgment or opinion of the court is mentioned.] Cro. J. 255. pl. 12. Mich. 8 Jac. B. R. Gybson v. Harbottle.

## (B. a) To whom, and how the Fine may be imposed.

If a statute prescribes a certain sum, and does not refer it to the discretion of the court, this court of

[ 1. ] IF a man be indicted for extortion in his office as bailiff to a sheriff, and found guilty, yet he cannot be fined to the party grieved in any sum. Hyl. 11 Car. B. R. Bruniden's case, in a writ of error upon a judgment at the sessions at Sarum, and the judgment reversed per curiam, because the judgment was to render treble damages to the party grieved, this not being upon any statute that warrants it.]

King's Bench cannot make any mitigation of it, per Coke and Doderidge J. but Coke said, that it is otherwise where the statute does not prescribe a certain sum, but says that it shall be double the value, or in such manner. Roll. Rep. 194. Pasch. 13 Jac. B. R. The King v. Wray.

If fines are set at the sessions, the court of

2. Fines assessed in court by judgment upon an information, cannot be afterwards qualified or mitigated. Cro. Car. 251. Pasch. 8 Car. B. R. The King v. Sir Ja. Wingfield & al'.

B. R. is to judge of them, whether set with or without cause, and to mitigate them when imposed excessively. Vent. 326. Pasch. 31 Car. 2. B. R. Anon.

A fine ought to be absolute, and not conditional; and therefore a fine, unless such a thing be done in futuro, is void; and by common law a fine for non-repairing of highway was \* for the default in not repairing the highway, and ought to be absolute; but by a late statute the fine is to go towards the repair, per Holt. 12 Mod. 318. Mich. 11 W. 3. Anon. \* In case it should not be repaired by such a time. See Kelyng's Rep. 34.

\* The imprisonment almost in all cases is only to retain him till he has made fine, and therefore

## (C. a) Imprisonment. Capiatur. Against what Persons Judgment shall be quod capiatur.

[ 1. ] IF an infant be plaintiff in an attaint, and this is found against him by verdict, he shall be imprisoned. 30 Ass. 18 adjudged.]

if he offers his fine he ought to be delivered immediately, and the king cannot justly retain him in prison after the fine tendered. Br. Imprisonment, pl. 100. cites it as determined in parliament anno 2 M. 1.—The attaint was upon oath passed against his father. Br. Imprisonment, pl. 64. cites S. C.—Fitzh. Imprisonment, pl. 10. cites S. C.

Fitzh. Imprisonment, pl. 10. cites S. C. accordingly.—Br. Imprisonment, pl. 64. cites S. C. that the infant was adjudged to prison.

[ 2. And the imprisonment shall not be pardoned of course. 30 Ass. 18. adjudged.]

Br. Amercement, pl. 61. cites

[ 3. If an infant brings an appeal, and this is abated because it does not lie during his infancy (admit this to be law) yet he shall not be imprisoned. 41 Ass. 14.]

S. C. but that is that he was amerced, but it was pardoned by his nonage.—Fitzh. Age, pl. 74. cites S. C. but is as to his being amerced.

[ 453 ]

[ 4. If an infant be attainted of a disseisin in an assise, the judgment



ment shall be \* Quod capiatur. 43 Ass. 45. adjudged. But this shall be † pardoned of course. 43 Ass. 45. adjudged.] Br. Imprisonment, pl. 36. cites 9 Ass. 7. contra that an infant disseisor with force shall not be imprisoned.—† Br. Imprisonment, pl. 55. cites S. C. per cur. because he is an infant.—Br. Coverture, pl. 43. cites S. C.

[ 5. In an assise against baron and feme, if the feme be received upon the default of the baron, and pleads in bar, and acknowledges an ouster, and the demandant takes issue upon the bar, and this is found for the demandant, the tenant shall not be imprisoned for this confession of an ouster, because she is a feme covert. 37 Ass. 1. adjudged.] Br. Imprisonment, pl. 69. cites S. C. accordingly, nor shall the baron be imprisoned, though before the default he and his feme pleaded in bar; for his plea was waved by his default, and therefore by award they both went quit.—Fitzh. Imprisonment, pl. 2. cites S. C.

In assise feme covert was found disseisor with force and arms, and therefore she was committed to prison. Br. Imprisonment, pl. 45. cites 16 Ass. 7.—Br. Coverture, pl. 36. cites S. C.

[ 6. If a feme covert be found guilty of a trespass before the coverture she shall be imprisoned. 22 Ass. 87.] Br. Imprisonment, pl. 53. cites S. C. and the feme was imprisoned, but nothing is mentioned there of the trespass being before the coverture.

Attaint passed against the baron and feme, and therefore they were amerced and taken, and so for feme covert taken and amerced. Br. Amercement, pl. 9. cites 42 E. 3. 26.

[ 7. If a bishop be attainted of a trespass against the peace he shall not be taken as another man, because he is a prelate. 29 E. 3. 42.] D. 315. 2. pl. 9. cites Pasch. 29 E. 3. 30.  
S. P. accordingly.—Ibid. pl. 99. Trin. 14 Eliz. S. P. adjudged.—S. C. cited Arg. Mo. 768.  
—Attaint by the bishop of Hereford, who was nonsuited, by which he was taken; quod nota. Br. Imprisonment, pl. 32. cites 6 Ass. 5.

[ 8. But it seems if he be attainted in a præmunire upon 27 E. 3. the judgment shall be Quod capiatur, &c. for this is expressly given by the statute against all men. Dubitatur. 39 E. 3. 7. b.]

[ 9. In an attachment upon a contempt against a prior for refusing to admit the vadelet of the king to a corody if he be attainted thereof he shall be imprisoned. Dubitatur. 38 Ass. 22.] Br. Imprisonment, pl. 100. cites 38 Ass. 32. but seems misprinted, and that it should be (22.) as in Roll.—Upon a nihil returned against a prior capias was denied, but there they said that upon rescous or contempt returned it lies. Mo. 763. Arg. cites 27 H. 8. 22.—And that in trespass a Nihil was returned against a prior, whereupon a capias was prayed; sed non allocatur, because it is a name of dignity, and presumed that he has assets in another county. Ibid. Arg. cites 7 H. 4. 2.

[ 10. If a bishop be attainted in a writ of oyer and terminer for burning of houses, the judgment shall not be Quod capiatur. 29 Ass. 33. adjudged.] Attaint by the bishop of Hereford who was nonsuited, and therefore was taken; quod nota. Br. Imprisonment, pl. 32. cites 6 Ass. 5.—Fitzh. Judgment, pl. 215. cites S. C.

[ 11. If a prioress be attainted in an assise of a disseisin against her own deed she shall be imprisoned. 40 Ass. 16.] Br. Imprisonment, pl. 20. cites S. C.—Ibid. pl. 93. cites S. C. accordingly.

[ 12. If a baron of parliament be found a disseisor with force in an assise, the judgment against him shall be Quod capiatur, Hill. 23 El. B. R. the Lord Stafford's case, adjudged and affirmed in a writ of error.] Cro. E. 170. pl. 9. [ 454 ]

Lord Stafford v. Thynne S. C. adjudged and affirmed; for it is upon a disseisin found, in which case a fine is given by the statute, and no person being exempt therein, it shall bind a nobleman as well as any other. And for a contempt a *capias* lies against a nobleman, and this fine is for the contempt to the law.

[ 13. *So in debt upon an obligation against a baron of parliament,* Fol. 221. *if the defendant pleads Non est factum, and the issue is found against him, the judgment against him shall be Quod capiatur.* Tr. 39 El. Cro. E. 503. B. R. between the Earl of Lincoln and Flower, adjudged in a writ pl. 26. S. C. of error.]

adjudged and affirmed in error; because upon this plea found against him a fine is due to the queen, and none shall have privilege against her, and therefore a *capias pro fine* well lies.

S. P. Br. Imprisonment, pl. 45. cites 16 Aff. 7.— S. P. Br. Coverture, pl. 36. cites 16 Aff. 7.

14. In assise two were found *disseisors with force and arms*, and the one was an infant of 18 years, therefore he was not awarded to prison, but the other was awarded to prison. Br. Imprisonment, pl. 43. cites 14 E. 3. 18.

The baron shall not be imprisoned for his feme, nor suffer corporal punishment for his feme, nor for her default.

15. In trespass of *battery against baron and feme*, the feme was found guilty and the baron not, and therefore the feme was imprisoned and the baron not. And note, that in every case of force, where any force is found in trespass *vi & armis*, false imprisonment, or assise, the judgment shall be *Quod defendens capiatur*; for he shall be imprisoned for a fine for the king. Br. Imprisonment, pl. 53. cites 22 Aff. 87.

Br. Imprisonment, pl. 100. (bis) cites 43 E. 18.

Assise against an infant who

16. An infant shall not be imprisoned for *pleading a false deed*. Br. Imprisonment, pl. 62. cites 28 Aff. 10.

*pleads joint rancy by deed with a stranger*, which passes against him by proof of witnesses or the like, he shall be imprisoned, per Babbington and Marten, because the statute is general and does not except an infant; but Paston contra; for an infant shall not suffer corporal punishment by statute unless infant be expressed by name in the statute. Br. Imprisonment, pl. 101. cites 3 H. 6. 51.

Judgment was given against an infant *quod capiatur*, whereupon error was brought, and this was assigned. Williams J. said that there is no case in law to warrant such judgment against an infant, *Quod capiatur (unless only in the case of felony)*. And the whole court agreed with him herein, that this is a clear error, and for that reason the judgment was reversed. Bulst. 172. [but mispaget 162.] Trin. 9 Jac. Daby v. Holbrooke.

Br. Fines for Contempts, pl. 11. cites S. C.

17. Feme brought appeal of the death of her husband, and the baron was brought into court, and the feme apposed if he was not her baron, who said that she supposed he had been dead, where in fact he was alive, by which she was imprisoned for her false appeal, and the baron went at large; for it seems that he was not of covin with the feme in bringing the false appeal. Br. Imprisonment, pl. 106. cites 8 H. 4. 18.

18. A mayor and commonalty who are attainted of disseisin with force, shall not be imprisoned, because they are a corporation. Br. Imprisonment, pl. 95. cites 21 E. 4. 13. & 14. per Pigot.

(D. a) *Who shall be imprisoned.*

[1. **I**N an *action* upon the statute of Marlbridge, for driving a *distress* out of the county, if the defendant justifies as bailiff to J. S. and pleads a special justification, and this is adjudged against him, he shall be imprisoned; for though he justifies as bailiff, yet it is not proved. 30 Ass. 38. adjudged.]

Br. Tref-  
pafs, pl. 255.  
cites S. C.—  
See (X)  
pl. 1. S. C.

[2. But it had been otherwise if J. S. whose bailiff he was, had been party. 30 Ass. 38.]

Br. Tref-  
pafs, pl. 255.  
cites S. C.

[3. If an *attaint* be brought against one who was not party to the first recovery, he shall not be imprisoned. 8 H. 4. 23. b.]

In attaint  
one came a  
latere, and

was received, and maintained the first oath, and it was found against him, yet he was not committed to prison. Br. Imprisonment, pl. 41. cites 14 Ass. 2.—8 Rep. 60. a. in Beecher's case, S. P. cites 14 Ass. 2. 42 E. 3. 26. b. 9 E. 4. 33.

[4. If an *attaint* be brought against a *feme*, tenant in dower of the possession of her husband, upon a recovery by her husband, if she maintains the oath or not, and this is found against her, and the jury attainted, yet she shall not be imprisoned, because she is not the person that recovered. \* 41 Ass. 18. adjudged. 40 Ass. 20. adjudged.]

\* Br. At-  
taint, pl. 80.  
cites S. C.—  
Fitz. At-  
taint, pl. 58.  
cites S. C.  
Attaint by  
baron and  
feme, which

passes against them, they shall be amerced and imprisoned. Quod nota. Br. Imprisonment, pl. 5. cites 42 E. 3. 26.

[5. But otherways it had been, if it had been found against the party himself who recovered in the first action, if he maintained the oath in the attaint. \* 41 Ass. 18. 8 H. 4. 23. b.]

\* Br. At-  
taint, pl. 80.  
cites S. C.—  
S. P. Br. Im-  
prisonment,  
not parties;

pl. 74. cites S. C. But contra if his heir or assignee maintain the oath who were per Mowbray J.

[6. So if he had not maintained it, but had made default, and the jury after had been attainted. 41 Ass. 18. admitted.]

Br. Attaint,  
pl. 80. cites  
S. C.

[7. In *trespass* against baron and feme, if the feme be found Guilty and the baron Not guilty, the baron shall not be imprisoned. 22 Ass. 87. adjudged.]

Br. Impri-  
sonment, pl.  
53. cites S. C.

[8. In *trespass* against baron and feme, if the feme be found Guilty, and the baron Not guilty, the baron shall not be imprisoned. \* 22 Ass. 87. adjudged. Contra Mich. 15 Jac. B. R. in † Wood and Sutcliff's case, by the clerks. Trin. 4 Jac. B. R. Rot. 376. between † White and Halse, adjudged in a writ of error upon a judgment in banco, where it was in an action of battery against baron and feme, and the baron found Not guilty, and the feme Guilty, the judgment was Quod capiantur as well the baron as the feme, because the baron is party to the action, and ought to pay the fine of the feme. Pasch. 11 Car. B. R. between † Mayow and Cockshott, per curiam, resolved in a writ of error upon a judgment in banco, in an ejectione firmæ against baron and feme; but the judgment reversed for another cause. Pasch. 11 Car. Mich. 14 Car. B. R. between Brown and Clugg, in a writ of er-  
ror

\* Br. Impri-  
sonment, pl.  
53. cites S. C.  
—See (C. a)  
pl. 6.  
† See (M)  
pl. 8. S. C.  
and the  
notes there.  
† Cro. J.  
203. pl. 3.  
Hales v.  
White, S. C.  
adjudged  
and affirm-  
ed in error  
though it  
was insisted  
that it

should have been a misericordia only for the baron. **ror** upon a judgment in the Marshalsea, and the first judgment affirmed as to \* this. *Intratur Pasch. 14 Car. Rot. 325. Contra Mich. 3 Jac. B. R. between Ansham and Shaftsbury.*]

And Mann the secondary shewed the court that so it was adjudged in the Exchequer Chamber in error of a judgment in this court.

|| Cro. C. 406. pl. 5, S. C. & S. P. assigned for error; but it was answered on the other side, that the judgment ought to be *Quod capiantur*, that it is only for the fine to the king, and the imprisonment is only till the fine is paid, and the baron ought to pay it; for the feme cannot; and to prove this he cited a precedent in B. R. Trin. 4 Jac. between Lewis and White, adjudged in point, and affirmed in error. And Broom the secondary said that all the precedents are so, and the judgment was affirmed as to this point; but on another error assigned, it was reversed.—Cro. C. 513. pl. 8. Mich. 14 Car. B. R. in battery against baron and feme, for battery by the feme, and found against them, it was resolved that the capiaturs should be against the baron only; and the clerk of the crown and secondary informed the court that so were all the precedents, though the wrong is done by the feme only.

\* See (M) pl. 8. S. C. and the notes there.

† Cro. E. 381. pl. 34. Percy v. Bardolf, Hill. 37 Eliz. in the Exchequer Chamber, S. C. & S. P. and judgment reversed ac-

\* Fol. 222.

[ 9. In an action of *debt against baron and feme, upon an obligation of the feme before coverture*, they plead *Non est factum*, and this is found against them, both shall be imprisoned, scilicet, the baron as well as the feme; for the *baron is guilty of a false denial of the deed*, (which is the cause of the imprisonment) as well as the feme. Mich. 15 Jac. B. R. in \* Wood and Sutcliff's case, per curiam and the clerks; and this was said by G. Croke that it was so adjudged 3 Jac. in Baldock's case, Hill. 37 El. 31. in Camera Scaccarii, between Say and Bardoise, adjudged in a writ of error for the reversal of the first judgment. *Intratur Mich. 33, 34 El. Rot. 470. between † Bardolf and Percie and his wife*, (it seems as if this was the same case before-mentioned in 37 El. where the first judgment was that the baron \* sit in misericordia, and that the feme capiaturs) and this was reversed, because it was not that the baron and feme capiantur.]

cordingly.—Mo. 704. pl. 982. S. C. in the Exchequer Chamber, adjudged accordingly.—S. C. cited Roll. Rep. 294. as adjudged accordingly, and Coke Ch. J. said it is a strong case.—S. P. accordingly, and so in trespass done by the feme dum sola, both shall be taken for the fine; to which the prothonotaries agreed. Het. 53. Mich. 3 Car. C. B. *Johnson v. Williams*.—S. P. by Dier and the clerks, Dal. 39. pl. 11. 4 Eliz. Anon. held accordingly; and the case in Het. 53. seems only a translation of Dal.

10. In *replevin* the attorney of the defendant shall gage deliverance, and shall find surety thereof, or shall go to the Fleet. Br. Imprisonment, pl. 78. cites 1 H. 7. 11.

(E. a) In what *Actions and Cases* the Judgment may be *Quod capiaturs*.

See (F. a) pl. 9. S. C.—Br. Imprisonment, pl. 40. cites

12 Aff. 33. S. P.—Fitzh. Imprisonment, pl. 22. cites S. C. & S. P. accordingly.—S. P. Br. Imprisonment, pl. 30. cites 2 Aff. 8. Brooke says the reason seems to be, because in *affises* all shall be principal, and none accessory.

\* Br. Imprisonment, pl. 88. cites

[ 2. In an *affise*, if the tenant be attainted of a *disseisin with force*, he shall be imprisoned. \* 17 Aff. 14. adjudged. 23 Aff.

11. adjudged. † 24 Aff. 2. adjudged. † 2 Aff. 8. adjudged. S. C. but S. P. does not appear. ¶ 2 Ed. 3. 43. adjudged.]

—Fitzh. Imprisonment, pl. 9. cites S. C. but not S. P.—Br. Disseisor, pl. 40. cites S. C. but S. P. does not appear. † It seems this should be 24 Aff. 3. that plea being the very S. P. which pl. 2. is not. † Br. Imprisonment, pl. 30. cites S. C. which see at pl. 1. supra, it being S. P. of that plea.—See (F. a) pl. 9. S. C. ¶ Fitzh. Imprisonment, pl. 22. cites 2 E. 3. but is S. P. with pl. 1. supra.

[ 3. In an assise, if the tenant be attainted of a disseisin, he shall be taken. 43 Aff. 9.] Br. Imprisonment, pl. 94. cites

S. C. but S. P. does not clearly appear.—See (F. a) pl. 7. and the notes there.—Fitz. Imprisonment, pl. 1. cites S. C.

He who is attainted as disseisor in assise shall be imprisoned, and if it be found that he carried away the goods, this is attainder with force without more, and the court ex officio ought to inquire of the force. Br. Imprisonment, pl. 82. cites 11 H. 4. 15. 17.

[ 4. Though it be without force. 27 Aff. 30. adjudged.] Br. Imprisonment, pl. 59. cites S. C. & S. P. admitted.—But 8 Rep. 59. b. in Beecher's case says, that where the disseisin is without force, he shall only be amerced; for the writ of assise makes no mention of vi & armis, but injuste & sine judicio disseisivit.—2 Inst. 236. S. P. but the court ex officio ought to enquire of the force, though if they do not it is no error, as has been adjudged.

[ 5. In an assise of nuisance, if the defendant be found guilty, he shall be imprisoned. \* 32 Aff. 2. adjudged. Contra † 19 Aff. 6. admitted.] \* Br. Imprisonment, pl. 68. cites S. C. accordingly.—Fitzh. Assise, pl. 109. cites S. C. accordingly.—† Br. Imprisonment, pl. 50. cites S. C.

[ 6. But if a man be attainted of a nuisance upon a presentment at the suit of the king, he shall not be imprisoned. 19 Aff. 6. adjudged.]

[ 7. In an assise by tenant by statute merchant, if the tenant be attainted of a disseisin with force, he shall be imprisoned. 43 Aff. 9.]

[ 8. In an assise, if the tenant by his plea does not deny his ouster, though he be after found a disseisor without force, yet he shall be imprisoned. 28 Aff. 15. adjudged.] In Assise, if the defendant pleads a plea in which an ouster is not denied, which passes against him, he shall be imprisoned, though he does not confess any ouster, and he who confesses an ouster, and the issue is found against him, shall be imprisoned. Br. Imprisonment, pl. 90. cites 28 Aff. 15. and 33 Aff. 6.

[ 9. In all actions of trespass general quare vi & armis, if the defendant be found guilty the judgment shall be Quod capiatur. Trin. 15 Jac. between Wheatly and Stone, adjudged per totam curiam in a writ of error at Serjeants Inn. Vide the same case, Hobarr's Reports 242.] Hob. 180. pl. 215. S. C.—S. P. for if judgment be against defendant, he shall be fined and imprisoned; for to every fine imprisonment is incident, and always when the judgment is Quod defendens capiatur, this is as much as to say Quod capiatur quousque finem fecerit. 8 Rep. 59. b. per cur. Mich. 6 Jac. in Beecher's case.—S. P. Br. Trespass, pl. 125. cites 19 H. 6. 8.—S. P. Br. Imprisonment, pl. 20. cites 19 H. 6. 8.—Br. Fine for Contempts pl. 22. cites S. C.

[ 10. In trespass, if the plaintiff declares that he levied a plaint in London, and upon process J. S. was arrested by a serjeant, and that the defendant vi & armis rescued him, per quod he lost his debt, and upon Not guilty pleaded it is found for the plaintiff, the judgment hereupon

Hob. 180. pl. 215. S. C.—S. P. for if judgment be against defendant, he shall be fined and imprisoned; for to every fine imprisonment is incident, and always when the judgment is Quod defendens capiatur, this is as much as to say Quod capiatur quousque finem fecerit. 8 Rep. 59. b. per cur. Mich. 6 Jac. in Beecher's case.—S. P. Br. Trespass, pl. 125. cites 19 H. 6. 8.—S. P. Br. Imprisonment, pl. 20. cites 19 H. 6. 8.—Br. Fine for Contempts pl. 22. cites S. C.

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[ 10. In trespass, if the plaintiff declares that he levied a plaint in London, and upon process J. S. was arrested by a serjeant, and that the defendant vi & armis rescued him, per quod he lost his debt, and upon Not guilty pleaded it is found for the plaintiff, the judgment hereupon

[ 10. In trespass, if the plaintiff declares that he levied a plaint in London, and upon process J. S. was arrested by a serjeant, and that the defendant vi & armis rescued him, per quod he lost his debt, and upon Not guilty pleaded it is found for the plaintiff, the judgment hereupon



hereupon ought to be *Quod defendens capiatur*; for though the nature of the action is properly an action upon the case, as touching the loss of the debt of the plaintiff, yet this being with force to the serjeant, who was a minister as well to the plaintiff as the court, \* the action may be *vi & armis*. Hobart's Reports 242. between Wheatly and Stone.]

Hob. 180.  
pl. 215.  
cites Pasch.  
14 Jac.  
Spear's case,

[ 11. In actions of trespass upon the case, if the defendant be found guilty, the judgment shall not be *Quod capiatur*, but *Quod sit in misericordia*. Trin. 15 Jac. between Spere and Stone, adjudged.]

S. C. adjudged and affirmed in error.—8 Rep. 59. b. in Beecher's case, S. P. accordingly.—If in B. R. the bill be trespass general, neither saying *Vi & armis*, nor upon the case specially, he may use it to either. Hob. 180. at the end of pl. 215.

See (Z) pl.  
2. S. C.—  
Br. Tres-  
pafs, pl. 255.  
cites S. C.  
D. 177. b.  
pl. 33. S. C.  
[pl. 32. is a  
D. P.]

[ 12. In an action upon the statute of Marlebridge for driving a distress out of the county, the defendant, being found guilty, shall be imprisoned. 30 Ass. 38. adjudged, that he shall be ransomed, which admits, as it seems, that he shall be imprisoned.]

[ 13. In an action of debt upon the statute of 1 & 2 Ph. & Ma. cap. of distresses, by which the defendant shall forfeit to the party grieved for the driving a distress out of the hundred 5 l. and treble damages, if the defendant be found guilty the judgment shall be *Quod capiatur*. D. 2 El. 177. 32. quære.]

[ 14. In trespass contra pacem for trampling his corn, if it be found that the cattle of the defendant escaped, but not contra pacem, and trampled the corn, yet the defendant shall be imprisoned, for he ought to keep his cattle at his peril. 27 Ass. 56. adjudged.]

Fol. 223.

[ 15. In an action upon the case upon an assumpsit, if the defendant be found guilty, the judgment shall not be *Quod capiatur*, but *Quod sit in misericordia*. H. 10 Jac. B. R. per curiam.]

[ 16. In an action of debt upon the statute of usury, for treble the sum lent, for taking more than 8 per cent. if the defendant be found guilty, the judgment shall be *Quod capiatur*, because he took it contrary to the provision of the statute. Pasch. 17 Car. B. R. between Lovell and Bidgood, it was so.]

So in debt  
on the 1 &  
2 P. & M.  
for taking  
more than  
4 d. for a  
distress, and

[ 17. In an action of debt upon the statute of 2 Ed. 6. for not setting forth of tithes, if judgment be given for the plaintiff, the judgment shall be *Quod sit in misericordia*, and not *Quod capiatur*, because this is but a debt given in recompence of tithes, this is the usual course.]

found for the plaintiff. The judgment being in debt for non-payment, and not upon the statute, ought to be in misericordia. Cro. C. 559. pl. 3. Mich. 15 Car. B. R. North v. Wingate.—S. P. admitted, Arg. that in actions founded upon the statute of tithes, and other such statutes, judgment shall be *Quod sit in misericordia*, but whether it should be so in an action on the statute De scandalis magnatum was the question in the principal case; sed adjournatur. Sid. 233. pl. 35. Mich. 16 Car. 2. in case of Proby v. Marquess of Dorchester.—Lev. 148. S. C. says, the court seemed to think the misericordia sufficient, but adjournatur.—Keb. 813, 814. pl. 90. S. C. adjournatur, but says, the court inclined that no capiatur is ever entered in such action on the statute.

S. P. per  
cur. 8 Rep.  
59. b. Mich.  
6 Jac. in  
Beecher's  
case, and

[ 18. In a writ of deceit against the party who recovered in a real action and the sheriff, if it be found that no summons was made, he that recovered before shall be imprisoned. 2 Ed. 3. 48. b. adjudged.]

that the judgment shall be *Quod pro falsitate & deceptione pried' [viz. curia] capiatur*.—But in action



'action' personal the disceit between party and party, which is in the nature of action upon the case, the defendant shall not be fined and imprisoned, but only amerced; for there is no disceit done to the court, but to the party. Ibid. 59. b. 60. a.

[ 19. So if a man recovers in a writ of attainst, by which the first jury is attainted, he that recovered in the first action shall be imprisoned. 2 Ed. 3. 50. b. \* 8 H. 4. 23. b. † 50 Aff. 4.]

\* Br. Imprisonment, pl. 13. cites S. C.

† Br. Attaint, pl. 84. cites S. C. — 8 Rep. 60. a. in Beecher's case, S. P. cites 14 Aff. 2. 42 E. 3. 26. b. 9 E. 4. 33.

In *attaint* the grand jury passed for the plaintiff, and against the petit jury, and judgment was given that the defendant and also the petit jury capiantur; quod nota bene. Br. Imprisonment, pl. 65. cites 30 Aff. 24.

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[ 20. But if a man recovers in an *attaint* against the *tertenant*, who was not *privy* to the first recovery, he shall not be imprisoned. 8 Hen. 4. 23. b.]

Br. Attaint, pl. 26. cites S. C. because he was a

stranger to the affise. — If he was not party to the first record as *tenant by rescuit*, or other *tertenant*, he shall not be fined. 8 Rep. 60. a. cites 14 Aff. 2. 42 E. 3. 26. b. 9 E. 4. 33.

21. In *per quæ servitia*, if the *tenant* comes, and will not *attorn* to the plaintiff nor *plead in bar*, he shall be imprisoned, and so he was, because he would not *do fealty*, and the next day he came back and did the fealty; and he who could not say any thing against homage, and yet would not *do homage*, was awarded to prison, and after he did the homage. Quod nota. Br. Imprisonment, pl. 105. cites 13 E. 1. and Fitzh. *per quæ servitia*. 23.

22. Those who *counsel* to make a *disseisin* with force, by which it is done, shall be imprisoned. Br. Imprisonment, pl. 88. cites 17 Aff. 14.

Fitzh. Imprisonment pl. 9. cites S. C. &

S. P. accordingly. — Br. Disseisor, pl. 40. cites S. C. & S. P. accordingly.

23. In nuisance those who *seised the* \* *meinor*, which could not be but with force and arms, were not awarded to prison; quod nota. The reason seems to be, because it was in *their own soil*. Quære if in another's soil. Br. Imprisonment, pl. 50. cites 19 Aff. 6.

\* Is a taking in the act, or with the thing upon him.

24. Where the defendant will not *gage deliverance* in *replevin*, or *pleads an insufficient plea* in bar of the *gaging deliverance*, he shall be imprisoned. Br. Imprisonment, pl. 79. cites 20 E. 4. 11. per Littleton.

Br. Return de Brief, pl. 100. cites S. C.

25. In *conspiracy* against those who caused a defendant in affise to *plead villeinage* falsely in delay of the plaintiff, by which the writ was *abated*, they pleaded Not guilty, and were found guilty, and were imprisoned. Br. Imprisonment, pl. 58. cites 26 Aff. 62. 27 Aff. 12.

26. The *petit jury* who are *attainted* in *attaint* shall be taken. Quod nota. Br. Imprisonment, pl. 20. cites 40 Aff. 20.

Br. Attaint, pl. 26. cites 8 H. 4. 23.

S. P. — Ibid. pl. 72. cites 30 Aff. 24. S. P. — Ibid. pl. 84. cites 50 Aff. 4. S. P.

27. In *conspiracy*, if the defendant be attainted, he shall be imprisoned. Br. Imprisonment, pl. 77. cites 46 Aff. 11.

Br. Conspiracy, pl. 31. cites S. C.

— S. P. Br. Imprisonment, pl. 89. cites 27 Aff. 59.

28. The plaintiff recovered in writ of deceit against the sheriff and the tertenant, who recovered against him in *præcipe quod reddat*, where he was not summoned, and the sheriff and the defendant who recovered in the first action were taken. Quod nota. Br. Imprisonment, pl. 10. cites 50 E. 3. 18.

29. Trespass *quare vi & armis piscat' fuit in D. &c.* and found guilty in part, and in part against the plaintiff, and judgment was that the plaintiff recover 8d. damages, and that the defendant shall be imprisoned. Br. Imprisonment, pl. 20. cites 19 H. 6. 8.

Br. Quid  
juris clamat,  
pl. 18.  
cites 37  
H. 6. 14.

30. In *quid juris clamat*, if the defendant appears, and will not attorn, he shall be awarded to prison till he will attorn. Br. Imprisonment, pl. 26. cites 37 H. 6.

31. If a man imprisonable by the law is imprisoned, and finds mainprise, and after makes default, *capias pro fine* shall issue; but *contra* where a man who is not imprisonable is imprisoned, and goes by mainprise, and after makes default, no *capias* shall issue. Br. Exigent, pl. 70. cites 2 E. 4. 1.

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32. In all cases where a thing is prohibited by any statute, the offender shall be fined and imprisoned. 8 Rep. 60. b. in Beecher's case.

Br. Fine  
for con-

tempt, pl. 21. says it seems that for an offence against any statute, which is a prohibition in itself that a man shall not do such an act, the offender shall be fined.

In ravi-  
ment of  
ward the  
plaintiff had  
judgment  
on Not

32. In false imprisonment, assise, &c. where the disseisin is found with force, and such like, and always where force is found it. all be parcel of the judgment that the defendant *capiatur*, viz. he shall be imprisoned *pro fine regi fiend'*. Br. Judgment, pl. 65.

guilty pleaded. It was assigned for error, because the judgment was *Quod capiantur*, though there is no *vi & armis* in the writ or count, and therefore should have been a *misericordia* only. Sed non allocatur; for being an offence against a statute law, the judgment is well enough; and so are the precedents in the book of Entries 568, and judgment affirmed. Cro. J. 631. pl. 4. Hill 19 Jac. B. R. Burbolt v. Kent.

33. An action was brought on the statute of Winton against a hundred, and the defendants were found guilty of part, and judgment *quod sint in misericordia*. It was assigned for error that judgment should have been *Capiantur*, because the action supposes that they did it in contempt, &c. Sed non allocatur; for this is only in a *non-feasance*, and not in a *male-feasance*, and so judgment shall be in *misericordia*. Cro. J. 348. pl. 1. Trin. 12 Jac. B. R. Oldfield v. the hundred of Witherly.

34. A judgment was given in London before the lord mayor upon the statute 5 Eliz. for using a trade, whereby the demand was of 40s. a month. It was assigned for error that the judgment was *Quod esset in misericordia*, whereas it ought to be *Quod capiatur*; and for that and another error judgment was reversed. Cro. J. 538. pl. 5. Trin. 17 Jac. B. R. Miller v. Regem.

35. Information in C. B. upon the statute 5 & 6 E. 6. of *ingrossers*, and judgment was *Quod sit in misericordia*, whereas it [was moved that it] should be *Capiatur*, it being against the statute, Sed adjournatur. 2 Roll. Rep. 400. Mich. 21 Jac. B. R. Anon.

36. Judgment in battery for the plaintiff was *Capiatur*. It was assigned

assigned for error, because the battery was *before the general pardon*, and so the fine pardoned, of which the court ought to take notice; *sed non allocatur*; for the court need not take conuſance thereof without demand of the party, and it does not appear whether he was a person excepted or not. Cro. C. 32. pl. 3. Paſch. 2 Car. in the Exchequer Chamber, Swaine v. Roberts.

37. 16 & 17 Car. 2. cap. 1. enacts, that *no judgment after verdict, confeſſion, by cognovit actionem, or relicta verificatione, ſhall be reversed for want of miſericordia or capiatur, or that a capiatur is entered for a miſericordia.*

See tit. Amendment and Jeofails (P) pl. 3.

38. 5 & 6 W. & M. cap. 12. *Whereas divers ſuits and actions of treſpaſs, ejeſtment, aſſault and falſe imprisonment are brought, and upon judgment entered the reſpective courts do (ex officio) iſſue out proceſs againſt ſuch defendant and defendants, for a fine to the crown, for a breach of the peace thereby committed, which is not aſcertained, but is uſually compounded for a ſmall ſum of money by ſome officer in each of the ſaid courts, but never eſtimated into the Exchequer; which officer, or ſome of them, do very often outlaw the defendants for the ſame, to their very great damage;*

In treſpaſs, aſſault, and battery, &c. there can be no capiatur-fine ſince the ſtatute 5 & 6 W. & M. but the plaintiff is to have 6 s. and 8 d. in coſts to pay ſo much to the king

S. 2. *For remedy whereof, be it enacted by the king and queen's moſt excellent majeſties, by and with the advice and conſent of the lords ſpiritual and temporal, and the commons, in this preſent parliament aſſembled, and by the authority of the ſame, that from henceforth no writ or writs, commonly called Capias pro fine, in any of the ſaid ſuits and actions in any of the ſaid courts ſhall be ſued out or proſecuted againſt any of the ſaid defendant or defendants, or any further proceſs thereupon; but the ſame fines, and all former fines yet unpaid, are and ſhall thereby be remitted and diſcharged for ever. Yet nevertheless the plaintiff or plaintiffs in every ſuch action ſhall (upon ſigning judgment therein, over and above the uſual fees for ſigning thereof) pay to the proper officer who ſigneth the ſame, the ſum of 6 s. and 8 d. in full ſatisfaction of the ſaid fine, and all fees due for or concerning the ſaid fine, to be diſtributed in ſuch manner as fines and fees of this kind have uſually been, and not otherwiſe; which ſaid officer and officers ſhall make an increaſe to the plaintiff or plaintiffs of ſo much in their coſts to be taxed againſt the ſaid defendant and defendants.*

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for the fine. Before this act when the fine was pardoned, the judgment was entered Nihil de fine quia pardonatur. So it is now in C. B. upon this

ſtatute; for they enter their judgments there *Nihil de fine quia remittitur per ſtatutum*; but in B. R. judgment is entered up without any notice taken of the fine; for the law is altered and taken away in effect by this ſtatute, and therefore not like the caſe of a pardon; for that does not alter the law, but excuſes the party. 1 Salk. 54. pl. 2. Mich. 8 W. 3. B. R. Linſey v. Clerk. — 5 Mod. 285. S. C. and it being inſiſted that it will be error now to have a capias awarded ſince the act prohibits the execution by remitting the fine, the court was of opinion that the capias ſhould be wholly omitted. — Comb. 387. S. C. and per Holt, no mention at all is now to be made of the fine, and the court ſeemed to agree. — Carth. 360. S. C. and after debate the court held that no capiatur ſhall be entered nor any thing in lieu thereof. — 12 Mod. 104. S. C. accordingly per cur.

## (F. a) In what Cases the Judgment shall be Quod Capiatur.

• See Rastal, 78. b. and 75. b.

[ 1. ] *In an assise for a rent-seck, if the defendant be found a disseisor by denier only, the judgment shall not be Quod capiatur, but only in misericordia without any finding whether it was vi & armis or not; for this could not be vi & armis. \* Otherwise entered Assise en rent 1. See otherwise entered Assise in office 2. capiatur pur tout where disseisin vi & armis is for other things in the same assise.]*

• Br. Imprisonment, pl. 70. cites S. C. accordingly. — Fitzh. Assise, pl. 335. cites S. C. accordingly.

[ 2. In an assise of a rent charge against several tertenants, if it be found that the plaintiff distrained for this, and one of the defendants without consent of the rest made a rescous, though the other are disseisors by the denier they shall not be imprisoned, but only he who made the rescous. \* 39 Ass. pl. 4. † 40 Ed. 3. 24. ‡ 40 Ass. 3.]

† Br. Assise, pl. 16. cites S. C. ‡ Br. Assise, pl. 16. cites S. C. — Fitzh. Assise, pl. 339. cites S. C.

• Br. Imprisonment, pl. 66. cites S. C. that he was not adjudged to

[ 3. If a man grants a rent out of land, and after, against his own deed, disseises the grantee of the rent, if he be attainted of this in an assise he shall be imprisoned. 29 Ass. 6. Quære contra \* 30 Ass. 33. adjudged because it is partly the act of the tenant.]

prison as in assise of land; for Thorpe said that of land all is his own act, but of rent it is also the act of the tertenant in payment of it. — Fitzh. Imprisonment, pl. 5. cite. S. C. and S. P. by Thorpe accordingly.

Br. Imprisonment, pl. 93. cites

[ 4. The same law where the disseisin is of land against his own deed, being thereof attainted in an assise. 40 Ass. 16. adjudged.]

S. C. accordingly. — In Assise it was said that the defendant leased to the plaintiff for life, and after entered and continued seisin for 3 years to the damage of 4 l. by which the plaintiff recovered, and the defendant was imprisoned for the disseisin against his own deed: for the lease was for years, and after the lessor confirmed his estate by deed for his life, and the plaintiff was taken. Br. Imprisonment, pl. 34. cites 8 Ass. 20. — Contra it seems if it had been leased without deed in writing. Br. Ibid.

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Br. Imprisonment,

pl. 60. cites S. C. though the feoffment be not shewn by deed. — Br. Titles, pl. 47. cites S. C.

In Assise it was found that the tenant in feoffment the plaintiff upon condition

[ 5. If a man be attainted of a disseisin against his own feoffment, though the feoffment was without deed, yet he shall be imprisoned. 28 Ass. 8. adjudged 31.]

and entered, and yet was not imprisoned for the disseisin. Per Thorpe, the cause was inasmuch as it was a feoffment upon condition, but if it had been a feoffment simple he should go to prison. Br. Imprisonment, pl. 67. cites 30 Ass. 34. — Fitzh. Imprisonment, pl. 3. cites S. C. and Thorpe took the same diversity as above [but the book seems misprinted in adding afterwards] wherefore he was awarded to prison, &c.

Br. Imprisonment, pl. 94. cites

[ 7. In an assise of a rent service, if it be found that the tenant claimed the seignior and distrained the tenant of the land for this where

where he had no seignory, and so disseised the plaintiff, the tenant shall be imprisoned; for the trespass done to the tenant \* [of the land] was at the same time a disseisin to the plaintiff. 43 Ass. 9. adjudged.]

S. C. but the case there is, that he who is attainted for distrain-

ing my tenant for rent without title, and levies it by distress without title, and is therefore attainted in assise, shall go to prison, and yet the force was to the tenant and not to the plaintiff.

\* So it is in the Lib. Ass. 43. pl. 9.

[8. In an assise against baron and feme, if they plead a bar and confess an \* ouster, upon which bar the plaintiff takes issue, and then the baron makes default, and the feme is received and pleads the same plea in bar, and the plaintiff takes issue thereupon, and this is found against the tenant, the baron shall not be imprisoned for the ouster which he confesses in his bar, because the assise was not taken upon this, but this was waved by the plea of the feme. 37 Ass. 1. adjudged.]

\* Fol. 224.

Br. Imprisonment, pl. 69. cites S. C. and says that the feme shall not

be imprisoned, because she was covert at the time of the confession.—See (C. a) pl. 5. S. C. and the notes there.

[9. In an assise against several who are found disseisors, if it be found that one came with force, all shall be imprisoned. 2 Ass. 8. adjudged.]

Br. Imprisonment, pl. 30. cites S. C.—

Brooke says the reason seems to be, because in trespass all shall be principal, and none accessory.—Br. Imprisonment, pl. 40. cites 12 Ass. 33. S. P.

10. If guardian takes feoffment in custodia sua this is disseisin, and he shall be imprisoned if the infant will bring assise against him, and the matter is found; quod nota. Br. Assise, pl. 451. (450) cites 8 E. 2. Itin. Canc. Ass. Fitzh. pl. 417.

11. He who would not suffer the plaintiff to distrain for rent charge arrear was awarded disseisor with force, for it countervails rescous, and therefore he was imprisoned. Br. Imprisonment, pl. 36. cites 9 Ass. 7.

12. Contra of him who makes disseisin by denial when the rent is demanded. Br. Imprisonment, pl. 36. cites 9 Ass. 7.

13. In assise the tenant justified by release for life to the plaintiff, rendering rent with clause of re-entry, and that he re-entered for non-payment of such rent due at such a day, &c. and the other said that the defendant first distrained for the same rent, and was possessed of the distress at the time of the re-entry, and found accordingly, and therefore the defendant was imprisoned for the ouster confessed; quod nota. Br. Imprisonment, pl. 42. cites 14 Ass. 11.

Br. Assise, pl. 192. cites S. C.

14. In assise, if release is found by verdict which was not pleaded, the defendant who made the release shall not be committed to prison; quod nota bene. Br. Imprisonment, pl. 47. cites 16 Ass. 15.

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15. In assise, because the defendant made disseisin contrary to his own deed of release and confirmation, therefore he was awarded to prison; quod nota bene. Br. Imprisonment, pl. 49. cites 18 Ass. 3.

16. The party was committed to the Fleet, because he appeared by attorney, and did not put in warrant of attorney before judgment. Br. Imprisonment, pl. 108. cites 38 E. 3. 8.

And note, that an attorney was committed

to the Fleet, because he did not put in his warrant of attorney for his client before verdict. Br. Imprisonment, pl. 108. cites 41 E. 3. 1.

Br. Corody,  
pl. 2. cites  
44 E. 3. 24.

17. *For contempt* the party shall be taken and imprisoned; nota, Br. Imprisonment, pl. 6. cites 44 E. 3. 25.

18. *In every case where a man shall make fine* he shall be imprisoned. Br. Imprisonment, pl. 2. cites 34 H. 6. 24.

### (F. a. 2) Upon what Plea.

1. *ASSISE* was adjourned into bank upon demurrer of bastardy, and the defendant at the day would have pleaded release, and was not suffered; for it was not made after the adjournment, and the plaintiff recovered, and notwithstanding that the deed of release appeared to be false, and ouster is confessed, yet the defendant was not imprisoned, for the justices are out of the county where the assise was brought, but Brooke says it seems to him, that the reason is, because the plea of the release was not admitted; for the justices of bank upon adjournment shall give such judgment as the justices of assise should give in the county. Br. Imprisonment, pl. 54. cites 23 Ass. 5.

2. In assise, if the tenant pleads jointenancy by deed, which passes against him, but he is acquitted of the disseisin, and all the rest passes against the plaintiff, yet he shall be imprisoned by the statute by reason of the false issue of jointenancy; quod nota by the statute de conjunctim feoffatis. Br. Imprisonment, pl. 102. cites 24 E. 3. 72.

3. In assise, because the defendant had confessed estate in the plaintiff, and pleaded in bar that which was adjudged no bar, therefore the assise was awarded in right of damages, and the defendant adjudged disseisor by his counterplea, and he was taken; quod nota. Br. Imprisonment, pl. 63. cites 28 Ass. 1.

### (F. a. 3) Pleading false, or denying true, Deeds or Records.

1. **I**F an infant defendant in assise pleads a false record or false deed, he shall not be imprisoned, by the reporter; but quere inde; for to this none answered. Br. Imprisonment, pl. 37. cites 10 Ass. 1.

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S. C. cited  
in Beecher's  
case, 8 Rep.

2. In assise record was pleaded, to which the plaintiff was party, who denied it, and after it was found against him, and yet the plaintiff was not imprisoned. Br. Imprisonment, pl. 38. cites 10 Ass. 10.

60. a. accordingly; for it is not his act but the act of the court, and he does not deny the record absolutely, but that non habetur tale recordum, and cites also 16 Ass. 19.—If in assise against two, the one vouches the other who enters and pleads recovery against the father of the plaintiff in bar, the plaintiff says that Nul tiel record, and the defendant has day to bring it in, and the defendant at the day brings in his record, yet the plaintiff shall not be imprisoned for the denying the record. Br. Imprisonment, pl. 43. cites 16 Ass. 19.

3. He who pleads jointenancy by deed or by fine, which passes against him, shall be imprisoned. Br. Imprisonment, pl. 85. cites 24 E. 3. 51.

4. He



4. He who *pleads a deed* which is *adjudged against him by rasure, interlining, or other suspicion*, shall be imprisoned, and shall make fine; as well as if it had been found against him by jury or confession. Br. Imprisonment, pl. 84. cites 24 E. 3. 74.

(G. a) Imprisonment by the Court. Upon what Pleas. For *denying his [or his Ancestor's] Deed*.

[1. IF a man denies his own deed, and this is *found against him by the country*, he shall be imprisoned. \* 45 Ed. 3. 11. † 23 Ed. 3. 21. b. adjudged. D. 3 Ed. 6. 67. 19. 26 Aff. 5. ‡ 34 H. 6. 24. per Fortescue.]

pl. 189, cites S. C. † Br. Fine for contempt, pl. 5. cites S. C.—Br. Imprisonment, pl. 2. cites S. C.—S. P. Br. Imprisonment, pl. 1. cites 33 H. 6. 54. And if he pleads false deed, which is found against him by verdict, in those cases he shall make fine, and shall be imprisoned.—But if he confesses the plea false before verdict, he shall be amerced, and shall not be fined nor imprisoned. Br. Imprisonment, pl. 1. cites 33 H. 6. 54. and M. 34 H. 6. 20. accordingly.—Br. Fine pur contempt, pl. 3. cites S. C. & S. P. For the judgment shall be given upon the confession of the action, and the plea is waved.—S. P. The defendant shall be fined. 8 Rep. 60. in Beecher's case.—See (C. a) pl. 1.

[2. So if the *defendant pleads the deed of the plaintiff in bar*, and the *plaintiff denies it*, and this is *found Not his deed*, the judgment shall be against the defendant Quod capiatur for the falsity. \* 33 H. 6. 54. b. curia. D. 3 E. 6. 67. 19. adjudged. 23 Aff. 11. adjudged. † 26 Aff. 5. ‡ 6 Aff. 4. adjudged.]

[3. But if a man pleads a *release in bar of an obligation*, and after makes default, by which judgment is given against him, yet he shall not be imprisoned. 45 E. 3. 4.]

he shall be condemned by default.

[4. So if a man brings *debt upon an obligation*, and the *defendant pleads his acquittance*, and the *plaintiff confesses it*, he shall not be imprisoned for the suit; for he never denied his deed. Quære. 45 E. 3. 11.]

by Candish, and he concludes it with an (ut credo,) and the year book says Quære.

[5. If a man *pleads a deed of the plaintiff or his ancestor made to the ancestor of the defendant who pleads it*, and this is found against him, he shall not be imprisoned for his falsity, because he could not know whether this was his deed or not, being made to his ancestor. 28 Aff. 10, Curia, Contra 28 Aff. 9. adjudged. Contra \* 26 Aff. 5.]

sonment, pl. 61. cites 28 Aff. 9. contra, that deed of the ancestor of the plaintiff made to the ancestor of the tenant was pleaded in bar, and it was found false, by which the tenant was awarded to prison.—S. P. accordingly, if the tenant or defendant uses a deed made to him or his ancestor, and pleads it, and it is found false, he shall be imprisoned; for there is default in him, because he takes upon him to plead it in the affirmative; but he who denies the deed of his ancestor, shall not be imprisoned; contra of him who denies his own deed. Br. Imprisonment, pl. 56. cites 26 Aff. 5. per Finch. and Trencher.—Br. Fine for Contempts, pl. 5. cites S. C. and same difference.—S. P. accordingly, 8 Rep. 60. a. in Beecher's case.

Br. Imprisonment, pl. 56. cites S. C. but S. P. does not appear there.—

[6. If a man recovers in an assise by default against A. who afterwards sues a certificate upon the release of the ancestor of the plaintiff with warranty, and the inquest being taken by default find this to be a good deed, yet the defendant in this certificate shall not be imprisoned. 26 Ass. 5.]

Fitzh. Judgment, pl. 189. cites 23 E. 3. 21. That tenant in assise sued certificate upon the deed of the ancestor of the plaintiff, which the plaintiff denied, and by nisi prius it was found for the tenant, whereupon double damages were awarded to the tenant upon the statute, and that the plaintiff capiatur, &c. Quod nota bene.

\* Br. Imprisonment, pl. 56. cites S. C.

[7. [So] if a man denies the deed of his ancestor, and this is found against him, yet he shall not be imprisoned. \* 26 Ass. 5. † 34 H. 6, 24. per Fortescue; but he shall be amerced.]

† Br. Imprisonment, pl. 2. cites S. C.—S. P. 8 Rep. 60. in Beecher's case.—2 And. 160. S. P. accordingly, Arg. cites 15 E. 3.—See pl. 1. in the notes there.—See (A. 2) pl. 1, 2. and the notes there.

In assise the deed pleaded by assignee was denied, and found against him,

8. In assise the tenant pleaded release of the plaintiff made to one, *Que estate he has*, and it was found against him, and therefore he was imprisoned, as well as if the deed had been made to himself. Quære. Br. Imprisonment, pl. 33. cites 8 Ass. 15.

and he was not imprisoned; for the deed was not made to him; and the same if it had been made to his ancestor, Br. Imprisonment, pl. 39. cites 11 Ass. 26.

9. A mayor and commonalty who deny their deed, which is found against them, shall not be imprisoned, because they are a corporation. Br. Imprisonment, pl. 95. cites 21 E. 4. 13. & 14.

10. Debt by an executor. The defendant pleaded a release of the testator made to himself, and upon Non est factum found against him, and judgment in misericordia, error was brought, because it ought to have been a capiatur; for that he pleaded a false deed. Cro. J. 255. pl. 12. Mich. 8 Jac. B. R. Gybson v. Harbottle,

(H. a) In what Cases it may be saved by Matter subsequent.

\* Cro. J. 64. pl. 2. Devis v. Clerk,

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S. C. accordingly by Fenner and Williams, but Gawdy contra, and (ceteris ab-

[1. ] If a man, where his own deed is pleaded against him, pleads *Non est factum*, and after at the nisi prius, or before verdict, *Relicta verificatione cognovit this to be his deed*, he shall not be imprisoned, but only amerced. Pasch. 3 Jac. B. R. between \* Davage and Clerk, per curiam, which intratur Hill. 43 El. Rot. 526. and there it was said, so is the common course of the King's Bench and Common Pleas. Contra 2 H. 6. B. R. 134. cited D. 3 El. 6. 67. adjudged contra Co. 8. Beecher 60. Trin. 16 Jac. B. R. between and † Waring, such a judgment affirmed in a writ of error. Hill. 10 Jac. B. R. between Trian and Beecher, adjudged, and said to be the common course, which intratur Mich. 10 Jac. Rot. 556.]

judgment was affirmed in error.—Noy 4. Davage v. Clark, S. C. ruled per cur. accordingly.—S. C. cited Raym. 195.—S. C. cited by the reporter in his remarks. 2 Saund. 192.

192. and approved by him.——Kelw. 42. a. pl. 4. Pasch. 17 H. 7 S. P. per cur. accordingly, obiter.——D. 67. b. Marg. pl. 19. cites Pasch. 16 J. B. R. Alderman Prior's case, which was debt upon obligation in the vill of Salop. The defendant pleaded Non est factum, but afterwards Relicta verificatione cognovit actionem, and judgment was Iden in misericordia; and upon error brought, 8 Rep. 60. was vouched that it should be Capiatur; but of the other side was vouched 33 H. 6. 54. e contra, and said that the precedents warrant it, and the court seemed to incline that In misericordia was good enough, and ordered that precedents be searched, & adjournatur.——S. P. accordingly; for the issue not being tried, but the action confessed, the usual course is only Quod sit in misericordia. Cro. J. 420. pl. 11. Hill. 14 Jac. B. R. Ashmore v. Ripley.——Jenk. 336. pl. 79. S. C. accordingly.——S. P. accordingly; for judgment of capiatur is not given for the delay, but rather for the falsity, and then when he comes in before verdict, and confesses the truth, he has saved his fine. 2 Roll. Rep. 45. Trin. 16 Jac. B. R. † Geerard v. Warren.——S. P. and upon error assigned, Beecher's case was vouched that it ought to be Capiatur; but because Cro. J. 64. Devis v. Clerk, is, that it shall be In misericordia, and so the books vary, adjournatur. Raym. 195. Mich. 22 Car. 2. B. R. Mortlock v. Charleton.——Mod. 73. pl. 28. S. C. adjournatur.——2 Saund. 191. S. C. says that at the first opening this case Twisden J. was strongly of opinion that it should be Capiatur, but that afterwards hæsitavit; and the reporter says he believes the parties agreed, and that no judgment was given; and says that the authority of Beecher's case was the cause of the doubt, it being there said positively that a capiatur shall be entered; but the reporter says, that none of the books there cited warrant that opinion, and then proceeds to examine them severally; which see there.

Raym. 202. Mich. 22 Car. 2. B. R. Powell v. Row, S. P. adjournatur.

2. In maintenance the plaintiff *after verdict* for him, and *before execution*, made a *release of all actions, suits, and demands*, yet this does not discharge the king's fine, but he was compelled to find surety for it. *Contra* if the release had been *before verdict*. Br. Fine for Contempts, pl. 21. cites 19 H. 6. 4.

3. After issue in *trespass* the defendant *confessed the issue*, and the plaintiff *confessed that he would not sue writ of inquiry of damages*, and it was prayed that he should be fined to the king; but Prisot said the plaintiff cannot have judgment of damages, and where he cannot have that, the defendant shall not be fined; otherwise it would be, had the issue been found against him by verdict, and so it seems like to a nonsuit; quod Moyle concessit. Br. Fine for Contempts, pl. 6. cites 34 H. 6. 43. and says the like judgment is vouched 35 H. 6. and 4 E. 4. 29.

3. In *debt for the king*, the defendant *pleaded Non est factum*, which was *found against him* by nisi prius, and *before the day in bank the king pardoned him all debts and quarrels*, and *at the day in bank the king had judgment to recover*, where, by the denying his deed, the king ought to have had a fine. The king demanded execution, and the defendant pleaded the pardon, and well, and the king was thereby barred of his execution, and yet the defendant was compelled to find bail for the king's fine for denying his deed; for though the debt and execution be pardoned, yet *the fine* is not, because this *commences by the judgment which was after the pardon*, and so a title subsequent; and if the judgment be erroneous by reason of the pardon, yet it is good till defeated by error or attain; Quod nota. Br. Fine for Contempts, pl. 47. cites 35 H. 6. 1, & 25.

Fol. 225.

## (I. a) [Imprisonment.] For what Causes.

[ 1. ] If the *process in an attain* be discontinued, by which the writ abates, the plaintiff shall not be imprisoned. 32 Aff. 13. adjudged.]

\* Br. Imprisonment, pl. 87. cites

[ 2. But otherwise it had been if he had been nonsuit after appearance. 32 Aff. 13. admitted. \* 19 Aff. 13. adjudged. † 6 Aff. 5. adjudged. 20 E. 3. Attaint 43.]

S. C.—† Br. Imprisonment, pl. 32. cites S. C.—Fitzh. Judgment, pl. 215. cites S. C.

In attain the plaintiff was *essoigned after appearance* contrary to the statute of Westm. 1. cap. 41. by which nonsuit was awarded, and also it was awarded that the plaintiff capiatur, and so see that upon nonsuit in attain the plaintiff shall be imprisoned. Br. Imprisonment, pl. 57. cites 26 Aff. 25.

[ 3. In an assise, if the tenant pleads a bar, and confesses an ouster of the plaintiff, and the demandant takes issue upon the bar, and this is found against the tenant, he shall be imprisoned for the ouster which he confessed. 37 Aff. 1.]

Br. Appeal, pl. 71. cites S. C.

[ 4. If a man be barred of an appeal of mayhem, because he was nonsuit after appearance of the defendant in another appeal, the plaintiff shall be imprisoned. 40 Aff. 1. adjudged.]

If in appeal of death, robbery, or any other appeal of felony or maihem the plaintiff be barred or nonsuit, or if the writ abates by his own default, he shall be fined and imprisoned. 8 Rep. 60. a. Mich. 6 Jac. in the Exchequer, in Beecher's case, cites 8 H. 4. 17. a. 20. for the malice is greater when it concerns life.

Appeal of death against R. S. of D. where the writ was abated because there was no such vill, hamlet, nor place known by name of D. and therefore it was awarded that the plaintiff take nothing by his writ, and that he shall be taken, and so see that the plaintiff shall be taken upon appeal where his writ abates. Br. Imprisonment, pl. 25. cites 4 H. 6. 16.—Brooke says, the same seems to be of nonsuit. Ibid.

Br. Imprisonment, pl. 29. cites S. C.—Br. Appeal, pl. 49. cites S. C.

[ 5. In an appeal against two, if the appeal against one be found false, the plaintiff shall be imprisoned. 1 Aff. 9. adjudged.]

Cro. E. 778. pl. 11. S. C. and judgment being given for the plaintiff in C. B. it was assigned for error

[ 6. In trespass, if the issue be found against the plaintiff, he shall be imprisoned. Mich. 42 & 43 El. B. R. between Bartholomew and Deighton adjudged, and though the fine due to the king is pardoned by the general pardon by parliament, yet the judgment shall be Quod capiatur, and not Quod sit in misericordia. Mich. 42 & 43 El. B. R. between Deighton and Bartholomew adjudged in a writ of error.]

that the offence to the queen is pardoned by the general pardon, and therefore the judgment should have been a nihil only for the queen, and not a capiatur; and that the entry usually is either De misericordia nihil, or Non capiatur, quia pardonatur. But Kemp and the prothonotaries said, that sometimes they enter it so, and sometimes not; and the court held it to be no error, Quia non constat, that he was not a person excepted; and therefore the judgment was affirmed.

Cro. C. 340. pl. 4. S. C. Curia advisare vult.

[ 7. In an indictment of barrettry, if the defendant be found guilty, and upon this judgment is given that the defendant shall be committed to gaol ibidem remansurus per two months, without bail or mainprize, & quod solvat domino regi pro fine summam 100 marcarum, & quod sit in misericordia, this judgment is erroneous, because

because when the defendant is fined the judgment ought to be *Quod capiatur*, for he ought to be imprisoned till he hath paid the fine, \* and the imprisonment in this case for two months is another punishment inflicted upon him for his offence, which is for a certain time, and therefore cannot amount to a *capiatur* for a fine. Hill. 9 Car. B. R. Chapman's case, in a writ of error upon such a judgment given by the justices of assise in comitatu Devonix this was a doubt per curiam, and precedents commanded to be searched, and after the fine was estreated into the Exchequer, and levied, and then the defendant did not prosecute his writ of error.]

8. In assise, if the tenant pleads release, which is found against him, he shall be imprisoned for pleading a false deed; quod nota bene. Br. Imprisonment, pl. 31. cites 6 Ass. 4.

9. Attaint was brought in C. B. of a verdict before justices of oyer and terminer, and because it appeared by the record that the plaintiff in the attaint had not made fine for the trespass of which he was convicted, therefore the justices committed him to the Fleet for the fine, &c. Br. Imprisonment, pl. 44. cites 16 Ass. 4. S. P. notwithstanding that by this suit he is to defeat the first judgment; Brooke says the reason seems to be, because the verdict shall be intended true till it be reversed in fact; contra it is said elsewhere upon writ of error. Br. Execution, pl. 77. cites S. C. — Br. Imprisonment, pl. 103. cites S. C. accordingly. — S. P. If the defendant brings attaint. Br. Fine for Contempts, pl. 46. cites 33 H. 6. 21,

10. The defendant was convicted of assault where he struck at the plaintiff and did not touch him, and was condemned in half a mark, and was taken, and yet he did not beat him. Br. Imprisonment, pl. 52. cites 22 Ass. 60. Br. Trespass, pl. 237. cites S. C.

11. Punishment of treasure-trove, wreck, and waif taken and carried away, is not by life and member, but by fine and imprisonment. Br. Appeal, pl. 63. cites 22 Ass. 99.

12. One that went armed into the palace was disarmed, and commanded to the Marshalsea prison, and was not admitted to bail till the will of the king was known. Br. Imprisonment, pl. 23. cites 24 E. 3. 33.

13. Appeal of maihem, in which A. is made principal and B. accessory, the plaintiff was nonsuited after appearance, and brought another appeal, and made B. principal and A. accessory, which was pleaded for estoppel, by which it was awarded that the plaintiff take nothing, and that the plaintiff capiatur, &c. Br. Imprisonment, pl. 71. cites 40 Ass. 1.

14. For disceit to the court for imbezzling an exigent, the plaintiff recovered 10l. damages, and the defendant was committed to ward, to be imprisoned till he had made fine to the king, and gree to the party. Br. Fine for Contempts, pl. 34. cites 41 Ass. 12. Br. Imprisonment, pl. 73. cites S. C.

15. In attaint passed against the plaintiff, judgment shall be that he take nothing by his writ, et quod sit in misericordia & capiatur. Br. Imprisonment, pl. 76. cites 43 Ass. 46.

16. In trespass the defendant pleaded villeinage in the plaintiff, who replied that he was frank, and of frank estate, and not his villein, upon which they are at issue; and the plaintiff surmised that the defendant took all his goods pending the issue, and yet he did



did not make any fine. Br. Fine for Contempts, pl. 17. cites 9 H. 5. 1.

See (E. a)  
pl. 9.

17. In all actions *quare vi & armis*, as *rescous*, *trespass vi & armis*, &c. if judgment be given against the defendant, he shall be fined and imprisoned; for *to every fine imprisonment is incident*, and always when the judgment is *Quod defendens capiatur*, it is all one as to say *Quod defendens capiatur quousque finem fecerit*. 8 Rep. 59. b. in Beecher's case, cites 19 H. 6. 8. b. 34 H. 6. 24. 11 H. 4. 25. 30 Aff. pl. 28.

18. A *bailiff returned languidus in prisona*, and upon examination confessed that he is in good health. The bailiff shall be imprisoned and fined. Br. Fines for Contempts, pl. 58. cites 31 H. 6. 42.

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19. He who comes in by return of *cepi corpus* shall go to prison. Br. Imprisonment, pl. 83. cites 33 H. 6. 26.

Contra upon writ of error. Br. Fine for Contempts, pl. 46. cites 33 H. 6. 21.

20. If the defendant brings certificate of *assise*, which is returned *tarde*, yet *capias pro fine* shall issue. Br. Fine for Contempts, pl. 46. cites 33 H. 6. 21.

21. A man sued *Corpus cum causa* out of London, and it was found by examination that *the action by which he claimed privilege in bank was sued by covin*; for the plaintiff in bank disallowed his suit against this prisoner; for the suit was discontinued by two years, and now revived by the plaintiff and the attorney in advantage of the prisoner, where another suit thereof was taken of later time against the prisoner, by which upon the examination of the matter the attorney and the plaintiff in this court, for their falsity, were committed to the Fleet, and were fined, and the prisoner remanded to London. Br. Privilege, pl. 43. cites 16 E. 4. 5.

Br. Privilege, pl. 19. cites 14 H. 7. 6. S. P. by Read and Fineux.

22. If one uses the countenance of law (the institution whereof was to put an end to controversies and vexation) for double vexation, he shall be fined; as if a man sues in C. B. and after sues him in London for the same cause, or in any such like court, the plaintiff shall be fined for this unjust vexation. 8 Rep. 60. a. Mich. 6 Jac. in Beecher's case, cites 9 H. 6. 55. 14 H. 7. 7. a.

This shall be punished either by

amercement or fine, &c. in regard of the court in which the action is brought; as if judgment be in C. B. the defendant shall be fined and imprisoned; but if the writ is *viconciel*, the judgment in the county shall not be *Quod capiatur*, because no court can fine and imprison but courts of record, and therefore in the last case he shall only be amerced; and though the writ, viz. of recaption, is of record, yet since the judges who are the suitors are not judges of record, neither is the court a court of record, they cannot fine or imprison, and so in all like cases. Ibid. 60. b. cites F. N. B. 73. (D) 8 E. 4. 5. 34 H. 6. 24. — 8 Rep. 120. a. S. P. accordingly. — 11 Rep. 43. a. S. P. accordingly.

24. In all cases where a thing is prohibited by any statute, the offender shall be fined and imprisoned. 8 Rep. 60. b. Mich. 6 Jac. in Beecher's case, cites 35 H. 6. 6. 19 H. 6. 4. in Maintenance.

So if the attain passes against the defendant, if he was party to the first record, he shall be fined and imprisoned. But if he was party to the

25. In an *attaint*, if the plaintiff is nonsuited or barred, he shall be fined and imprisoned. 8 Rep. 60. a. Mich. 6 Jac. in the Exchequer, in Beecher's case, cites 32 Aff. 9. 42 E. 3. 26. b.



the first record, as *tenant* by receipt, or other tertenant, he shall not be fined. 8 Rep. 60. a. in Beecher's case, cites 14 Aff. pl. 2. 42 E. 3. 26. b. 9 E. 4. 33.

(K. a) Fines and Amercements. Where imposed jointly or severally.

1. *C* *Hamperty* by 2. The one was nonsuited, and he and his pledges de prosequendo were amerced, and the other and his pledges not, notwithstanding that the nonsuit of the one in this action shall be the nonsuit of both, and nevertheless they two found one and the same pledges, but they were amerced as pledges of the one, and not as pledges of the other. Br. Amercement, pl. 11. cites 47 E. 3. 6.

2. In assise against 2, the disseisin is found with force, though the disseisin is joint, yet the fine shall be several. 11 Rep. 43. a. per cur. cites 10 E. 3. 10. a. [ 470 ]

3. If a trespass be done by two jointly, yet they shall be amerced severally. F. N. B. 75. (G). S. P. & S. C. cited 11 Rep. 43. a. per cur. — Roll. Rep. 74. S. P. and cites S. C.

4. If two sue a plaint and are nonsuited, the amercement shall be several. F. N. B. 75. (G) 11 Rep. 43. a. S. C. cited per cur.

5. When a judgment is given in B. R. or in C. B. &c. against two, & ideo in misericordia, yet when it is affected by the coroners en pais, the amercement shall be laid upon them severally. 11 Rep. 43. a. b.

6. When there are diverse defendants, and they are by the law to make fine, the judgment is *Ideo capiantur*, yet it shall be construed reddendo singula singulis, and they shall be taken by a several capias pro fine. 11 Rep. 43. b.

7. In some cases the fine or amercement shall be imposed upon diverse jointly, as upon a county, an hundred, and so upon a vill, &c. As for the escape of a murderer, &c. 11 Rep. 43. b. cites 22 E. 3. Corone 238. 2 E. 3. ibid. 147. 3 E. 3. ibid. 302. 316. &c. and 10 E. 3. 10. a. and says that this is for the uncertainty of the persons and for infiniteness of number. As where several were shooting at pricks and he who gave aim was killed with an arrow, all the town was amerced; per Coke Ch. J. Roll. Rep. 75. cites 22 E. 3. Corone 238. and 2 E. 3. 147. where the amercement is upon a village, town, or county it shall be joint, otherwise it would be infinite to assess every one in particular, Quod fuit concessum per curiam.

8. In actions personal, as debt, detinue, &c. if one plaintiff appears and the other is nonsuited (which in law personal actions is the nonsuit of both) he that survives or appears shall not be amerced, for there is no default in him, but in the other only who does not appear. 8 Rep. 61. a. Mich. 6 Jac. in the Exchequer in Beecher's case cites 47 E. 3. 6. b. 43 Aff. 3. 7 H. 6. 36. 38 E. 3. 31. 41 Aff. 14.

9. If the one demandant in a \* real action, or the one plaintiff in a personal action where summons and severance lies, As in debt by executors if one be nonsuited and the other proceeds, he that is non-suited \* Br. Amercement, pl. 3. cites S. C.

† Br. Amercement, pl. 48. cites S. C. nonfuit shall not be amerced. 8 Rep. 61. a. cites 28 H. 6. 11. b. † 21 E. 4. 77. b.

Roll. Rep. 32. pl. 4. Bullen v. Godfrey S. C. adjournatur. — Ibid. 73. pl. 16. S. C. resolved accordingly per tot. cur.

10. The *steward* at a court leet time out of mind had *used to swear* 12 or more inhabitants *to be chief pledges, and they at every leet being sworn, had used to present that they the said chief pledges should pay to the lord of the manor for head-money, or pro certo lre 10s. and to pay it accordingly at the same leet.* The 12 chief pledges being sworn to inquire, &c. *refused to make such presentment, whereupon the steward for the contempt imposed a fine of 6l. upon them all jointly; but resolved that the same should have been imposed severally, the refusal of the one being not the refusal of the other.* 11 Rep. 42. Mich. 12 Jac. Godfrey's case.

11. One fine was imposed upon *two coroners for not returning an outlawry*, Roll. Rep. Arg. 34. cites 4 H. 9. 24. and *ibid.* 35. the court said they agreed the case of the two coroners that a joint fine shall be upon them, and that so it is upon the *sheriffs of London*, because they are but as one officer to the court. Patch. 12 Jac. B. R.

Sid. 174. pl. 6. S. C.

12. An *information* was exhibited against several *for a confederacy to impoverish the farmers of the excise, and being convicted, the whole court agreed that they should all be fined not jointly but separatim according to their several abilities, whereupon one was fined 1000 marks and the others 300 marks each.* Lev. 125. Hill. 15 & 16 Car. 2. B. R. the King v. Sterling & al'.

## (L. a) Pleadings.

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Br. Lete, pl. 16. cites 9 E. 4. 40. — Br. Dette, pl. 113. cites

S. C. and S. P. — Br. Count, pl. 95. cites S. C. and S. P. — Br. Account, pl. 56. cites S. C. and S. P. by Pigot; but Brooke says *Quære* the difference. — In second deliverance judgment upon demurrer was given against the conusance, because he pleaded it was presented coram *señatoribus*, and does not shew their names. 3 Le. 7. 8. pl. 21. Mich. 7 Eliz. C. B. Scarning v. Cryer. — Mo. 75. pl. 205. Scarning v. Cryett S. C. — Bendl. 159. pl. 219. S. C. and the pleadings.

1. *IN account or avowry* for amercement in courts he need not to shew the names of the presenters, per Needham J. *Contra in debt* for amercements, per Pigot Serjeant. Br. Pleadings, pl. 38. cites 9 E. 4. 21.

2. In an avowry for an amerciament in a leet the defendant shall *allege prescription in the use of this affeering by affeersors.* Per Frowike and Kingmill. Kelw. 65. a. pl. 5. Trin. 20 H. 7. in a nota.

3. In trespass for taking a gelding, &c. the defendant pleaded that the plaintiff was tenant of such a manor, and it was presented at court that the plaintiff had surcharged the common, for which he was amerced 6s. and 8d. and affeered by J. N. and J. D. and that he as bailiff distrained the gelding, &c. Upon demurrer it was objected because it *presentatum fuit only that he surcharged, &c.* and did not allege in *facto* that he surcharged. Sed non

non allocatur; for it suffices for the bailiff to take conuſance of the preſentment and no more, & non refert as to him whether it be true or not. Cro. E. 748. pl. 1. Paſch. 42 Eliz. B. R. Rowleſton v. Alman.

4. In replevin, the defendant made conuſance as bailiff for an amercement, the plaintiff pleaded *De injuria ſua propria* and *traverſed the preſcription to hold court and to amerce*. The court held the avowry for the amercement inſufficient, becauſe it was *not alleged in faſto that the plaintiff did not appear after ſummons*; but only *præſentatum fuit per homagium*, that he did not appear. Cro. E. 885. pl. 26. Paſch. 44 Eliz. C. B. Parham v. Norton.

Mo. 643.  
pl. 887.  
S. C. but  
S. P. does  
not appear.  
—2 And.  
178. pl. 100.  
S. C. but  
S. P. does  
not appear.

—So in replevin the defendant avowed for an amercement upon a *preſentment* by the homage for *reſpairing a houſe*, being a customary tenant of the ſaid manor. It was aſſigned for error inter al' that the avowry was only that *præſentatum fuit* that he had not repaired, but did *not ſay in faſto & categorice, &c. that he had not repaired*, that being a matter traverſable. The judgment was reverſed, [but for which error, or whether for all, non conſtat.] Le. 242. pl. 327. Mich. 32 & 33 Eliz. B. R. Blunt v. Whitacre.

5. In treſpaſs *Quare clauſum fregit*, the defendant juſtified diſtraining for amercement in the ſheriff's tourn, impoſed on the plaintiff for incroaching upon the king's highway. It was moved in ſtay of judgment that it did *not ſhew that it was preſented before the juſtices of the peace at their ſeſſions*. according to the ſtatute of 1 E. 4. cap. 2. which ſays that the juſtices of peace ſhall award proceſs againſt the perſon ſo indicted before the ſheriff, which was not done in this caſe. Coke Ch. J. ſaid this ſtatute *extends not to treſpaſſes not contra pacem* (as in this caſe the encroachment is;) for otherwiſe the lord of a leet could not diſtrain for an amercement without ſuch preſentment before juſtices of the peace. And though the ſtatute ſpeaks of felony, treſpaſs, &c. the ſame is to be meant of other things of the ſame nature, which is proved by the claufe in the ſtatute, viz. that they ſhall be imprifoned; which cannot be in the principal caſe; to which Warburton and Winch J. agreed. Godb. 190, pl. 271. Trin. 10 Jac. C. B. Hardingham's caſe.

2 Brownl.  
120. Barney  
v. Harding-  
ham S. C.  
adjournatur.

6. In treſpaſs, the defendant juſtified by an amerciament in a court leet againſt a common baker for ſelling bread againſt the aſſiſe in locis vicinis, and that by a precept out of the court he diſtrained for it; adjudged the plea ill, becauſe it did *not ſet forth that the amerciament was for an offence done within the jurisdiction of the leet*, which ſhall not be preſumed unleſs ſpecially pleaded; beſides it ſets forth that the plaintiff was amerced, but did *not ſay to what ſum*. Hob. 129. pl. 166. Paſch. 14 Jac. Wilton v. Hardingham.

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7. One was imprifoned for a fine aſſeſſed upon him for *depaſturing his ſheep within the bounds of the foreſt*, the defendant juſtified for that *præſentatum fuit that he depaſtured* them there. And the queſtion was, whether this be ſufficient without alleging in faſto that he depaſtured them there. And Mountague Ch. J. held it ſufficient to ſay *Præſentatum fuit*. 2 Roll. Rep. 177. Trin. 18 Jac. B. R. Webb and Tucke's caſe.

Godb. 277.  
pl. 392.  
Hill. 16  
Jac. B. R.,  
the S. C.  
but S. P.  
does not  
appear.

8. In debt upon an amercement in a court baron for a treſpaſs in the

See 3 Le.  
at the end

of the case  
of Scarning  
v. Cryer, in  
pl. 21.

Mich. 7  
Eliz. C. B.  
S. P. ac-  
cordingly.

—Mo. 75. pl. 205. S. C. & S. P. accordingly. —Bendl. 160. pl. 219. S. C. & S. P. accordingly.

Cro. C. 300.  
pl. 3. S. C.  
adjudged by  
3 justices  
(absente the  
Ch. J.) ac-  
cordingly.

—Jo. 300.  
pl. 3. S. C.  
adjudged  
according-  
ly.

*the common fields with his hogs; it was moved in arrest of judgment, that it was not alleged that any trespass was committed, but only that præsentatum fuit, that a trespass was committed; and for this cause Haughton held it to be ill; and said, that so it had been adjudged in this court before during his time. Cro. J. 582. pl. 2. Mich. 18 Jac. B. R. Armyn v. Appletoft.*

9. In trespass for taking a bullock, &c. The defendant justified, for that the plaintiff was *presented for not appearing at the sheriff's tourn*, being debito modo summonitus, and *amerced by the jury*, and *assessed by 4 of the jury to 40s. and certified to the next quarter sessions, and there confirmed, whereupon by a warrant to him from the steward he took and sold it, &c.* Upon a demurrer it was insisted that the amercement ought always to be assessed by the court; for it is a judicial act, and shall be assessed by the assessors appointed; and that it being levied by the defendant as bailiff by warrant of the steward of the court is ill, because by the statute 1 E. 4. cap. 2. it is expressly appointed, that *no fine or amercement in the tourn shall be levied, unless it be certified at the next sessions of the peace by indenture, and inrolled there, and process made from the justices of peace of the sessions to the sheriff*, none of which circumstances were observed here, and so adjudged for the plaintiff. Cro. C. 275. pl. 13. Mich. 8 Car. B. R. Gryffith v. Biddle.

10. An *unreasonable* fine imposed by a court leet for a *contempt in court* was set aside, and judgment for the plaintiff. 2 Jo. 229. Mich. 34 Car. 2. B. R. Berrington v. Brooks.

11. Debt for amercement in a leet, and shewed that defendant was presented and amerced, and that the amercement was assessed by all the jurors to 40s. Upon demurrer it was objected, that it was *not shewn to what sum the amercement was*, and yet some precedents are so, as Rast. Ent. 553. a. b. 109. b. Judgment was given for the defendant. 3 Lev. 206. Mich. 36 Car. 2. C. B. Evelin v. Davis.

Ibid. 138.  
says, if it  
had been in  
replevin  
where the  
defendant  
made conu-  
sance in the  
right of the  
lord, it  
might be  
well

12. In trespass for taking a tankard, the defendant justified as *bailiff* for an amercement in a leet, and that he by a precept of the dean and chapter, lords of the leet, distrained the said tankard. Upon demurrer it was objected, that he *ought to shew that the precept was directed to him by the steward of the court*, and then to set forth the warrant, without which he cannot justify to distrain for an amercement; and of this opinion was the whole court, and judgment for the plaintiff. 3 Mod. 137. Mich. 3 Jac. 2. B. R. but adjudged 1 W. & M. Matthews v. Cary.

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enough as here pleaded; but where it is to justify by way of excuse, you must *aver* the fact, and allege it to be done, and set forth the warrant itself, and the taking *virtute warranti*; for a bailiff of a liberty cannot distrain for an amercement *virtute officii*, but must have a warrant from the steward or the lord. —Carth. 73. S. C. and same distinction taken by Holt Ch. J. and adjudged for the plaintiff; for a bailiff cannot distrain otherwise than by a precept directed to him by the steward of the court.

And the  
difference  
between  
trespass and  
replevin is

13. An *avowry for a distress by a precept from the court leet*, setting forth the holding of the court, and the plaintiff an inhabitant within the leet, must not only set forth the presentment by the jury of

of the fact done, but *must aver that the fact was committed*, and saying *Licet ipse fuit culpabilis* is not sufficient. Gibb. 108. pl. 9. Mich. 3 Geo. 2. B. R. Stephens v. Howard. very well founded and supported by authority, per Raymond Ch. J. with whom agreed the whole court. Ibid.

(M. a) Discharged. *How.* By Word without writ, or by *Writ*.

1. **W**HERE the lord or justice of peace commands a vagrant to prison, in such case the lord or justice of peace may command the bailiff to let him go at large again, and the reason is, because they may award him to prison upon suggestion. Br. Imprisonment, pl. 27. cites 14 H. 6. 8. per cur. As the chancellor of England may award a man to the Fleet, or a justice may

command a man to the Fleet or other prison for rebellion in his presence, and in such cases they may discharge him without writ. Ibid.

But where a man is taken by writ, or awarded to prison by writ, there he cannot be discharged without writ or command of the king; note the difference. Ibid.

2. A writ was directed to the sheriff of Yorkshire, who issued a warrant to the bailiff of the liberty of Pomfret, who did not return the writ, for which he was amerced 50l. at several times, and estreated into the Exchequer; afterwards the parties agreed, and upon producing a certificate from the plaintiff's attorney that the debt was paid, these amercements were discharged upon motion to the barons. 1 Salk. 54. pl. 3. Mich. 9 W. 3. in Scacc. Eyres v. Smith. Ibid. 55. the reporter adds a note, that the clerks said that the court uses not to discharge amercements, but

allow you to compound them.

(N. a) Of a Vill, &c.

1. **A**T common law, if a man be killed in a town in the day-time, viz. so long as there is full day, and the murderer escapes, the town shall be amerced. 7 Rep. 6. b. cites 21 E. 3. Corone 238. D. 210. b. in pl. 25. S. P. obiter, though the murder be done in an

open field or in a lane, &c. Hill. 4 Eliz.—But if it was done in the night, and the felon escapes, the town shall not be amerced by the common law, because in such case no laches or negligence can be imputed to the inhabitants of the vill; per cur. 7 Rep. 6. b. Trin. 29 Eliz. C. B. in case of Milburn v. Dunmow inhabitants.

2. 3 H. 7. cap. 1. recites, That the law of the land is, that if any man be slain in the day, and the felon not taken, the township where the death or murder is done shall be amerced, and if any be wounded in peril of death, the party that so wounded him should be arrested and put in surety till perfect knowledge be had whether he so hurt should live or die; and enacts, that if any person be slain or murdered in the day, and the murderer escapes untaken, the township where the deed is so done shall be amerced for the said escape, and the coroner shall have authority to inquire thereof upon view of the dead body, **[ 474 ]** A stroke was given about 4 o'clock in the afternoon of the 10 Jan. and about 8 o'clock in the same evening the party died, and

then the  
murderer  
escaped;

*body, and so may the justices of peace, and certify them into the king's bench.*

the question was, whether the town should be amerced? and it was urged, that it was not felony till the party died, and there none should be charged with the offender till the party was dead; and per Wray, it would be hard that the town should be amerced in this case; for though in discretion the town might have stayed the party, yet it is not bound to do so, &c. 3 Le. 207. pl. 268. Pasch. 30 Eliz. B. R. the town of Green in Sussex's case. — Le. 107. pl. 145. S. C. in totidem verbis, but adds that the court took time to advise.

A presentment grounded on this statute set forth, that J. S. was killed at C. and that the murderer fled away in the night, and therefore it was quashed, and the amercements discharged; for it appears that the vill is not liable to be amerced within the statute; for by the statute the escape must be in the day. Sty. 14. Pasch. 23 Car. B. R. the vill of Charleton in Kent's case.

2 Hawk.

Pl. C. 74.

cap. 12. s. 2.

Says, that

3. If a man kills another *in his own defence*, and escapes, &c. the town shall be amerced as an ancient mark of the common law that made it felony. 2 Inst. 315.

by the common law, if any homicide be committed, or dangerous wound given, whether with or without malice, or even by mis-adventure or self-defence, in any town, or in the lanes and fields thereof, in the day-time, and the offender escape, the town shall be amerced, and if out of a town, the hundred shall be amerced.

4. If a *murder* be committed *in the day-time* in a town not inclosed, and the murderer is not apprehended, the township shall be amerced; but if inclosed, whether in the night or the day, the township shall be amerced. 3 Inst. 53. cap. 7.

5. If *hue and cry* is made by the forest law for *vert or venison*, and any township or village follow not the hue and cry, they shall be amerced at the justice seat. 4 Inst. 294. cap. 73.

6. If a *dead body* in a prison, or other place, whereupon an inquest ought to be taken be *interred*, or *suffered to lie so long that it putrifies before the coroner has viewed it*, the gaoler or township shall be amerced. 2 Hawk. Pl. C. 48. cap. 9. s. 23. says it has been adjudged.

7. *Information* was brought against the defendants, for that they were incorporated by the name of *Mayor and Commonalty of London*, and it was a *walled city*, and had sheriffs, justices of peace, and coroners within themselves, and by law they ought to suppress riots and unlawful assemblies. Notwithstanding which, in June 4 Car. in the day-time, *Doctor Lamb was slain in a tumult, and none of the offenders taken, nor any person known nor indicted for that felony*. They appeared and confessed the offence, & posuerunt se in gratiam curiæ, and they were amerced 1500 marks; and it was conceived that it was an offence at the common law to suffer such a crime to be committed in a walled town in the day-time, and none of the offenders to be known or indicted. Cro. C. 252. pl. 2. Pasch. 8 Car. B. R. the King v. the Mayor, &c. of London.

8. If one be *killed in a vill*, and the coroner makes no inquest, the vill must be amerced; per Twifden; for probably the coroner had no notice of it, and if there was an inquest it must be returned by the certiorari; per cur. Keb. 278. pl. 74. Pasch. 14 Car. 2. B. R. Ld. Buckhurst, Wentworth and Bellasis.



For more of Amercement and Fines in General, see  
Distress, Error, Judgment, Trial, (Z. b) (A. c)  
(G. g) and other Proper Titles.

(A) Amicus Curia.

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**I**N writ of entry the tenant made default after default, and a stranger came and said that he himself pending the writ had recovered the tenements by verdict of assise against the demandant and the tenant, &c. and prayed that no judgment be made of his frank-tenement, &c. yet the demandant had judgment to recover seisin. Thel. Dig. 200. lib. 13. cap. 14. f. 1. cites Mich. 2 E. 3. 43.

2. In scire facias out of a fine, the tenant said that the queen had a writ of disceit pending against him to reverse this fine, because the tenements are parcel of a manor of which the queen is seised, which is ancient demesne, &c. upon which another day was given to all the parties, at which day the demandant was received ex gratia, to answer and plead to the writ of deceit, to which he was a stranger. Thel. Dig. 200. lib. 13. cap. 14. f. 3. cites Trin. 26 E. 3. 65.

3. In scire facias a stranger came and prayed that the writ be abated for default apparent in the writ, but the court had not any regard thereto; for the tenant pleaded to the action. Thel. Dig. 200. lib. 13. cap. 14. f. 3. cites 26 E. 3. 72.

Every stranger as Amicus curia may move the court of

matter apparent in the writ, and the court ex officio is bound to abate the writ, if it be vicious, for false Latin or default of form, &c. Thel. Dig. 200. lib. 13. cap. 14. f. 5. cites Hill. \* 4 H. 6. 16. and 9 H. 6. 29.

\* Br. Brief, pl. 210. cites S. C. — Br. False Latin, &c. pl. 96. cites S. C. \* Br. Office del Court, pl. 6. cites S. C. & 41 E. 3. 21. — Hardr. 86. Arg. cites S. C. — Br. Error, pl. 49. 5. P. by Brooke. — A stranger may inform the court of error. Br. Error, pl. 50. cites 11 H. 4. 62. 65. 92. per Huls.

4. In formedon the tenant traversed the gift, and a stranger came and said that the reversion was in an infant, being in ward of the king, and that the tenant pleaded by collusion, &c. and prayed that they would not, &c. Et non allocatur, because none answered for the king or for the infant. Thel. Dig. 200. lib. 13. cap. 14. f. 4. cites Mich. 2 H. 6. 5.

5. So it is of matter apparent in the count. Thel. Dig. 200. lib. 13. cap. 14. f. 5. cites Mich. 19 H. 6. 10.

6. So of matter apparent in an avowry. Thel. Dig. 200. lib. 13. cap. 14. f. 5. cites Mich. 34 H. 6. 8.

7. So it is of an office or indictment found for the king. Thel. Dig.

Dig. 200. lib. 13. cap. 14. f. 5. cites Mich. 5 E. 4 8. b. 7 E. 4. 17.

8. Any as Amicus curia may *shew* to the court *that* the *one* *plea* goes to the whole, and the court ex officio shall discharge all but that. Br. Deux Plees, pl. 23. cites 5 E. 4. 124.

9. Upon an outlawry the question was whether one, as Amicus curia, might appear and *quash an inquisition found upon the outlawry for matter insufficient apparent*, Nicholas and Parker, barons, took it clearly upon the book of 7 E. 4. that an Amicus curia might shew cause to quash an inquisition, and said that BENNET'S CASE, which had been urged to the contrary, went off by agreement of the parties. Hardr. 85, 86. Mich. 1656. in the Exchequer, The Protector v. Geering.

[ 476 ] 10. Serjeant Maynard being denied offering exceptions in arrest of judgment, on a conviction of forgery, unless his client was present, urged, that as Amicus curia he might *inform them of an error in the proceedings*, to prevent their giving a false judgment at any time, though he could not move in mitigation of the fine, *without his client's presence*; but the court said the party ought to be present in both cases. 2 Show. 297. pl. 297. Pasch. 35 Car. 2. B.R. The King v. Ruckeridge.

11. Any one, as Amicus curia, may move to quash an *indictment apparently vitious*, be the crime what it will; per the Ch. J. Cumb. 13. Hill. 1 & 2 Jac. 2. B. R. The King v. Vaux.

12. In a case upon the statute of frauds, Sir Geo. Treby, as Amicus curia, informed the court that he was present at the making that statute, and what was the *intention of the parliament*. Comb. 33 Mich. 2 Jac. 2. B. R. in the case of Horton v. Ruefby.

13. If an *action be abated*, any one as Amicus curia may move to have the *verdict set aside*, even the defendant himself. Cumb. 170. Mich. 1 W. & M. in B. R. Dove v. Martin.

For more of Amicus Curia in General, see other Proper Titles.

## Ancient Demesne.

### (A) *What shall be said Ancient Demesne.*

Fol. 321.

[ 1. **A** *N* *acre of land* may be ancient demesne, which is *parcel of a manor which is not ancient demesne.* 30 Ed. 3. 12. admitted. Land which is *frank-fee* may be held of a manor of ancient demesne. \* 11 H. 4. 86.]

\* Br. Ancient Demesne, pl. 15. cites S. C. & S. P. agreed.

[ 2. That which is *approved* by the lord *out of his wastes*, cannot be ancient demesne. 5 Ass. 2. For the wastes are part of the demesne.]

For that which is in the hands of the lord

time out of mind cannot be ancient demesne, but that which was held by the tenants before time of memory. Br. Ancient Demesne, pl. 26. cites S. C.—Br. Ibid. pl. 32. cites 21 Ass. 13. S. P. as to the approving out of the waste; but though no answer was given directly to such plea pleaded, yet Brooke says it seems clearly that such land so approved is frank-fee, because it is taken out of the demesnes.—No land which is in the hands of the lord can be said to be ancient demesne. Br. Ancient Demesne, pl. 6. cites 41 E. 3. 22. per Kirton.

3. Note, that that part of the manor which is ancient demesne, which is in the hands of the lord or of the king, viz. the demesnes, is *frank-fee*, and that which is in the hands of the tenant is *ancient demesne only*. Br. Ancient Demesne, pl. 32. cites 21 Ass. 13.

4. All that was under the title of *the king's land in the time of King E. the Confessor, or held of W. the Conqueror*, is ancient demesne; and that which is under other titles is not ancient demesne; for those were not the king's land at this time, and therefore not ancient demesne. Br. Monstraverunt, pl. 1. cites 40 E. 3. 44.

Those manors are called Ancient demesne of the crown, which were in the hands

of St. Edward the Confessor, or William the Conqueror, and so expressed in the book of Domesday, made or begun in the 14th year of William the Conqueror. 4 Inst. 269.

5. There cannot be ancient demesne unless there is a *court and suitors, &c.* Per Coke Arg. 2 Le. 191. Trin. 28 Eliz. in pl. 240. [ 477 ] S. P. So if there be but one suitor; for that the suitors are judges, and therefore the demandant must sue at common law, there being a failure of justice within the manor. 4 Inst. 270. cap. 58.

6. In ejectment brought of lands in ancient demesne, it was resolved that *copyhold lands* are as the demesnes of the manor, and are the lord's freehold, and therefore not impleadable but in the lord's court. Cro. J. 559. pl. 5. Hill. 17 Jac. B. R. Pymmock v. Helder.

It was admitted that copyholds being parcel of the manor are pleadable

at common law; and the franktenements held of the lord are pleadable only in the lord's court. 3 Lev. 405. Mich. 6 W. & M. in C. B. in case of Smith v. Frampton.

7. *No lands* are ancient demesne but *lands holden in socage*, and consequently

\* The translations

of Fitzh. N. B. are consequently lands held by knight-service \* &c. in fee, are not ancient demesne. F. N. B. 13. (D) (by knights service and in fee) but the French edition is as here.—F. N. B. 14. (B) S. P. accordingly; for the tenants in ancient demesne are called Sokemans, viz. tenants of the plough.—Br. Ancient Demesne, pl. 41. cites S. C.—S. P. Arg. Le. 232. in pl. 315.—2 Le. 190. Arg. in pl. 240.—4 Inst. 270. cap. 58. S. P.

All those that hold of these manors in socage are tenants in ancient demesne, and they plowed the king's demesnes of his manors, sowed and harrowed the same, mowed and made his meadows, and other such services of husbandry, for the sustenance of the king and his honourable household, maintenance of his stable, and other like necessities pertaining to the king's husbandry. 4 Inst. 159.

8. The *rent* may be parcel of the manor, and so may the *services*, though the land is *frank-fee*, and whatever is holden of the manor is not part; per Eyre J. And per Holt, land *holden of the manor* cannot be said to be part of the manor. 12 Mod. 13. Mich. 3 W. & M. Parker v. Winch.

### (A. 2) Tried How.

Br. Mort-  
dancesor,  
pl. 19. cites  
S. C. and  
10 E. 3.  
and M.

1. **A**Ncient demesne was *tried per patriam*, but no argument made of it; but the parties joined issue upon it, and all found for the plaintiff. Quod nota. Br. Ancient Demesne, pl. 27. cites 8 Aff. 35.

9 E. 2. accordingly.—S. P. Br. Ancient Demesne, pl. 29. cites 9 Aff. 9.

2. Recordare came into *ancient demesne* to remove the plea, because the *tenant claimed to hold at the common law*, and at the day they were *at issue* upon the cause if the land was *ancient demesne or not*, and found for the demandant, by which he recovered *seisin of the land in bank*. And so see that they hold plea in bank, upon original commenced in the court of ancient demesne. Br. Cause de Remover, pl. 29. cites 30 E. 3. 21.

Br. Ancient  
Demesne,  
pl. 23. cites  
S. C.—  
Br. Mon-  
straverunt,  
pl. 2. cites  
S. C.

3. Where a man *pleads ancient demesne*, &c. the court will not write for the record of Domesday to prove it, but the *party shall have day at his peril to bring it in*, and so he had, &c. Quære if C. B. may write to them; for Nescitur quæ earum est altior curia, and the *other party may bring in the same record sub pede sigilli to prove it frank-fee*, if he will. Br. Record, pl. 33. cites 39 E. 3. 6.

[ 478 ] In writ of entry sur disseisin, issue being taken whether the manor of S. in com. S. was ancient demesne or not. The court ordered the tenant to have the *book of Domesday* in court such a day at his peril, and it was brought into C. B. accordingly *remitted out of Chancery, with the certiorari which issued out of Chancery, and directed to the treasurer and chamberlain of the Exchequer*, &c. by which record it was found ancient demesne, and judgment that the tenant eat inde sine die, and that the demandant should sue in ancient demesne &c. D. 250. b. pl. 87. cites a precedent Mich. 3 H. 8. in C. B. Rot. 341.

Issue was  
whether  
the manor of  
Osterbury  
was ancient  
demesne,  
and the  
court

4. It appears that all the land which is intituled in the Domesday Book in the Exchequer under tit. *Terræ Regis*, *Terræ E. Regis* & *Confessoris*, or *Terræ Regis W. Conquestoris*, is ancient demesne; and those which are intituled under other titles, as *Terræ Episcopi* S. &c. those are not ancient demesne, and plea was made there, where it was shewn that the *manor of D. was ancient demesne*; that in this

will

will are 3 manors of one name, and that they hold of the manor which is under this tit. *Terræ Episcopi E.* and not of the manor, which is under this title *Terræ Regis*; quod nota, and so he confessed, and avoided the record which was shewn to prove the ancient demeſne. Br. Ancient Demeſne, pl. 5. cites 40 E. 3. 45.

awarded  
Quod querens  
habeat re-  
cordum libri  
de Domesday  
hic in o. Tab.  
Hillarii. At

the day the plaintiff had the book brought into court by a porter. It appeared that Edward the Confessor, anno 18 regni sui, had given this manor to the abbot of R. and that it was not under the title de *Terræ Regis*; for all lands held in ancient demeſne which the Confessor had, were written by William the Conqueror, anno 20 of his reign, in the book of Domesday, under the title de *Terræ Regis*, and these are all held in ancient demeſne at this day; but those which were given away by the Confessor, and which are not written in Domesday under that title, are not ancient demeſne, and a respondeas ouster was awarded. Cited by Holt Ch. J. 1 Salk. 57. pl. 2. as Patch. 9 Jac. in C. B. Rot. 3165. Sanders v. Welch.

5. It is in a manner agreed that the land in the *Domesday* book which comes under tit. *Terræ Regis E.* or under *Terræ Regis only*, which is intended *W. the Conqueror*, in whose time the book was made, shall be intended ancient demeſne; and the plaintiff shewed divers charters by inspeximus, which rehearsed that *W. the Conqueror* dedit, concessit, & confirmavit, &c. the said manor, to prove that it was land of *W. the Conqueror*, and because *dedimus* may be a confirmation, and the grant of land in possession, &c. therefore per Belk. this is no trial that it was the land of *W. the Conqueror*, or of king *E.* and also that ancient demeſne shall not be tried by charter, nor in other manner but only by the *Domesday* book; quod nemo negavit, and therefore the plaintiffs were nonsuited, and by him the lands of other lords are also in the *Domesday* book under other titles. Br. Ancient Demeſne, pl. 9. cites 49 E. 3. 22.

And by him  
it was ad-  
judged that  
the manor of  
T. which  
was in the  
hands of the  
earl of Ches-  
ter at the  
time of the  
making of  
the Domes-  
day book,  
was ancient  
demeſne,  
per concil-  
ium regis,  
because it  
had been

some time in the seisin of the king. Quære inde, and the manor above was under tit. *Terræ St. Stephani*, and therefore not ancient demeſne as held there. Ibid.

6. In assise the tenant said that he held for term of life, the reversion to the king, and prayed aid of him, and had it, and procedendo came after into the Chancery, and the king said upon the aid that the land is within *K.* which is ancient demeſne of the king, as of the dutchy of Lancaster, and held of *K.* and was certified accordingly by the *Domesday* book. And per tot. cur. this is not to the purpose, because the king may have his action of deceit; and per Cheney and Culpeper, *The king, of a thing of the dutchy, shall be as a common person*, and that by lease for life by the dutchy seal, if the tenant in assise prays aid of the king, the assise shall be taken immediately. Br. Ancient Demeſne, pl. 15. cites 11 H. 4. 85.

7. No cause is sufficient to remove a plea out of ancient demeſne, but that which makes the land frank-fee; per Brian. Br. Ancient Demeſne, pl. 35. cites 1 H. 7. 30.

8. If ancient demeſne is pleaded of a manor, and denied, this shall be tried by the record of the book of *Domesday* in the Exchequer; but if issue be taken that certain acres are parcel of the manor which is ancient demeſne, that shall be tried per pais; for it cannot be tried by that book. 9 Rep. 31. a. in the case of the Abbot de Strata Marcella.

Issue was  
taken whe-  
ther lands

[ 479 ]

in a fine were ancient demeſne, pretending that they were parcel of the manor of Bowden in the county of Northampton, which was pretended to be ancient demeſne, and the book of *Domesday* being brought into court, it appeared that the manor of Bowden in the county of Leicester was,

contained

but

but not the manor of Bowden in the county of Northampton; and though it was insisted that the manor of Bowden was both in the county of Leicester and Northampton, yet it was not regarded, the Domesday book being against the plaintiff. Brownl. 43. Trin. 15 Jac. Griffin v. Palmer.—— Hob. 188. pl. 230. Anon. but S. C. accordingly, and that so the plaintiff was barred.

Lev. 106.  
Holdage v.  
Hodges  
S. C. ac-  
cordingly;  
and that  
Windham  
J. thought  
it might be  
supplied by  
proof of  
witnesses,  
because  
this is a  
trial by the  
court upon  
the book  
and not by  
jury, and  
compared it to a trial of infancy by inspection and affidavits; but ceteri e contra, and so it was ruled.

9. In ejectment for land in Long-hope in the county of Gloucester, the issue was, whether it was ancient demesne or not, and at the trial the Domesday book was brought in by an officer of the Exchequer, by which it appeared that Hope was ancient demesne, but nothing was mentioned of Long-hope, thereupon they offered to prove by the steward of the manor and others that it was the same as was formerly called Hope, and lately had got the name of Long-hope. And Windham J. was for examining the witnesses, but all the court e contra, and that he had failed of the record to prove the issue; and if the truth was as supposed, they might have helped it in pleading, that it was known by the one name and the other, and that Long-hope and Hope are one and the same vill. Sid. 147. pl. 6. Trin. 15 Car. 2. B. R. Holdy v. Hodges.

Seetit. Toll  
(E) pl. 1. 2.

## (B) What Privileges the Tenants shall have. \* Toll Free.

The  
reason why  
such tenants  
are dis-  
charged of  
toll, is be-  
cause the  
lands of

[ 1. **THEY** may sell or buy oxen, or other beasts to manure their land, and maintain their house, without paying toll in every market and fair throughout the realm. † 7 H. 4. 44. b. F. N. 228. A. † 9 H. 6. 25. b. or other place.]

Edward the Confessor, and William called the Conqueror, set down in the book of Domesday were ancient demesne, and so called Terræ Regis, and they were to provide victuals for the king's garrisons in those troublesome times, &c. They had this privilege among others that quiete exerceant aratra & terram excolerent; this was said by Coke to have been found by him in an ancient reading. 2 Le. 191. in pl. 240..

† Br. Ancient Demesne, pl. 14. cites S. C. but is only a short note referring to another place, but mentions nothing particularly as to this point, and the place referred to is misprinted.

† Fitzh. Toll, pl. 8. cites S. C.——F. N. B. 228. (D) S. P.

In an action on the case for not paying toll, the defendant said that he held certain lands of R. lord of the manor of H. which manor is ancient demesne, of which manor all the tenants have been free to sell or buy beasts or other things for the manurance of their lands, and maintenance of their houses, without paying toll in any market or fair, &c. and so justifies that he came to the same market and bought certain beasts, as the plaintiff had declared, and that some of them he used about his manurance of his lands, and some of them he put into pasture to make them fat, and more fit to be sold, and afterwards he sold at such a fair, &c. And the opinion of the court was with the defendant. 2 Le. 191. pl. 240. Arg. cites 7 H. 4. 111.

Br. Ancient  
Demesne,  
pl. 14. cites  
S. C. but  
S. P. does  
not appear.

[ 2. If a tenant be a common merchant to buy and sell cattle in a fair and market, and he buys cattle to sell again, and within half a year after sells them again at a fair, yet he shall not pay toll, but is within the privilege. 7 H. 4. 44. b. curia.]

———See tit. Toll (E) pl. 1. and the notes there.

[ 3. So



[ 3. So in this caſe, if he ſells them *the next market* after he bought them, yet he is within the privilege. 7 H. 4. 44. b. Curia.]

Br. Ancient Demeſne, pl. 14. cites S. C. but

S. P. does not appear.—Br. Aſſon ſur le caſe, pl. 37. cites S. C.

[ 4. They ſhall be diſcharged of toll for *things coming from the tenement* of which they are ſeiſed in ancient demeſne, \* *ſold for their ſuſtenance.* 9 H. 6. 25. b.]

Fitzh. Toll, pl. 8. cites S. C.—2 Inſt. 221. S. P. cites

S. C.—F. N. B. 14 (E) S. P.—Ibid. 228 (D) S. P. \* [Theſe words ſeem to be ſuperfluous.]

[ 5. So they ſhall be diſcharged for things *ſold ariſing upon the ſoil held.* 19 H. 6. 66. b.]

Br. Ancient Demeſne, pl. 22. cites

S. C. and S. P. by Newton Ch. J.—S. C. and S. P. cited Arg. 2 Le. 191. pl. 240.—2 Inſt. 221. S. P.

[ 6. So they ſhall be diſcharged of toll for their *goods bought for the ſupport of their eſtate*, according to the quantity of their tenement in ancient demeſne, *as for their cattle* and other things neceſſary. 9 H. 6. 25. b.]

Fitzh. Toll, pl. 8. cites S. C. and S. P. by all the juſtices clearly.—

F. N. B. 228 (A) ſays they ſhall be quit of toll for their goods and chattels which they merchandize with others, as well as for their other goods; for the writ is general *Pro bonis & rebus ſuis, &c.*—And Ibid. (D) tenants at will within ancient demeſne ſhall be diſcharged of toll as well as the free tenants, or the tenants for life or years of lands in ancient demeſne ſhall be diſcharged of toll for their goods.—They ſhall be diſcharged of toll of all things bought for their own uſe. 2 Le. 191. Arg. cites 28 Aſſ. ult. by Thorp, Green and Seton.

[ 7. They ſhall be diſcharged of toll for *things* which they buy to manure their ſoil. 19 H. 6. 66. b.]

Br. Ancient Demeſne, pl. 22. S. C. and S. P.

[ 8. Quære if they ſhall be diſcharged of toll of *all things* which they ſell and buy. 19 H. 6. 66. b.]

Br. Ancient Demeſne, pl. 22. cites

S. C. and S. P. accordingly.—In treſpaſs, the plaintiff ſhewed that the town of Leiſter was ancient demeſne, and that the inhabitants thereof had uſed to be diſcharged of toll; and that the queen by her letters patents had commanded all bayliſſs, mayors, ſheriffs, &c. that thoſe of Leiſter ſhould be diſcharged of toll, notwithstanding which the defendant took toll, &c. and though he did not ſhew that it was taken of ſuch things which were for proviſion for their houſes or manuring of their lands, Shute J. was of opinion that an inhabitant within ancient demeſne, though he be not a tenant, ſhall have the privileges. Adjournatur. 2 Le. 190. pl. 240. Trin. 28 Eliz. B. R. Town of Leiſter's caſe.

[ 9. Nota, in juſtice Hutton's reports there is cited one Ward's caſe to be adjudged in B. R. 28 Eliz. touching the toll of the town of Leiſtock in Suffolk, where it was adjudged that the privilege of ancient demeſne does not extend to him that is a merchant, or that trades and gets his living by buying and ſelling, but the privilege was annexed to the perſon in reſpect of the land, ſcilicet, becauſe they manure the demans of the king, and provide corn for the garrifons of the king, and purveyance was not then in uſe, but the privilege is intended for thoſe things which ariſe or are to be uſed in the land, or for his family that manures the land.]

Cro. E. 227. pl. 13. Paſch. 33 Eliz. B. R. Ward v. Knight S. C. and was for tiſhes of cables for merchandize, and adjudged for the de-

ſendant; but gave no publick reaſon for it; but privately did agree between themſelves for the ſubſtance of the matter; for Wray ſaid, there is no reaſon they ſhould be diſcharged for mer-

chandize,

chandize, and that so are the books.—*Le. 231. pl. 315. Trin. 30 Eliz. B. R. the S. C. adjudged Quod querens nil capiat per Billam.*—2 *Inst. 221. S. P. accordingly.*—*S. P. Arg. 2 Le. 191, pl. 240.*

S. P. Br. 10. The tenants in ancient demesne shall go quit of toll. Br. Tenant per Ancient Demesne, pl. 49. cites the Register, fol. 260. Copie, pl. 25. cites F. N. B. fo. 228.

[ 481 ]

Fol. 322. (C) *Who shall be a Tenant to have the Advantage of the Privilege. In Respect of the Estate.*

Fitzh. Toll, [ 1. **T**ENANT in fee of ancient demesne shall have the privilege to be toll-free in fairs and markets. 9 H. 6. pl. 8. cites S. C. 25. b.]

Fitzh. Toll, [ 2. So tenant at will of ancient demesne shall have the privilege to be toll-free. 9 H. 6. 25. b.] pl. 8. cites S. C. accordingly.—F. N. B. 28 (D) S. P. accordingly, and so of tenant for years.—S. P. by Shute J. 2 Le. 191. in pl. 240. cites 37 H. 6. 27. by Moile.

(C. 2.) What other Privileges they shall have besides being Toll-free.

Tenants of Ancient Demesne shall be exempted from the ket, view of frank-pledge, and from sheriffs tourns. Br. Ancient Demesne, pl. 43. cites F. N. B. fol. \* 166. \* F. N. B. 166. (F)

Br. Tenant by Copy, &c. pl. 25. cites S. C. & S. P. accordingly.—2<sup>d</sup> Franktenants in ancient demesne, and tenants at will, shall be quit of toll, pontage, and the like, and the lord also. Br. Ancient Demesne, pl. 43. cites F. N. B. fol. 128. Br. Privilege, pl. 56. S. P. accordingly.—S. P. and so of Passage. F. N. B. 14 (E) and 228. (B)—S. P. and so of Murage. Arg. 2 Show. 75. in pl. 59.

\* F. N. B. 11. (F) S. P. accordingly + F. N. B. 14. (E) S. P. unless they have lands at the common law. — And ibid. in the new notes there (c) says, that is, if they have not other lands in frank-fee, and cites 3. To the end these tenants might apply themselves to their labours for the profit of the king, they had six privileges. \* 1<sup>st</sup>. That they should not be impleaded for any their lands, &c. out of the said manor, but have justice administered to them at their own door by the little writ of right close directed to the bailiffs of the king's manors, or to the lord of the manor, if it be in the hands of a subject, and if they were impleaded out of the manor, they may abate the writ. + 2<sup>dly</sup>, They cannot be impanelled to appear at Westminster or elsewhere in any other court upon any inquest or trial of any cause. ‡ 3<sup>dly</sup>, They are free and quiet from all toll in fairs or markets for all things concerning husbandry and sustenance. ¶ 4<sup>thly</sup>, And of taxes and tallages by parliament, unless they be specially named. \*\* 5<sup>thly</sup>, And of contribution to the expences of the knights of the parliament, &c. †† 6<sup>thly</sup>, If they be fe-  
verally

verally diſtrained for other ſervices, they all, for ſaving of charges, may join in a writ of *monſtraverunt*, albeit they be ſeveral tenants. Theſe privileges remain ſtill, although the manor be come to the hands of ſubjects, and although their ſervice of the plough is for the moſt part altered and turned into money. 4 Inſt. 269.

Br. Ancient Demeſne, pl. 42.—4 Inſt. 270. cap. 48. S. P. But yet they ſhall be ſworn out of it in perſonal actions. † See (B) †† F. N. B. 14. (E) S. P. accordingly.—F. N. B. 14. (E) S. P. accordingly.—Ibid. 228. (C) S. P. accordingly.—Br. Privilege, pl. 56. S. P. cites F. N. B. 14. (D) &c. tit. Writ of Monſtraverunt.—And they ſhall be acquitted from amercedments of the county. F. N. B. 14 (E) in the new notes there (b) cites clauſ. 12 H. 3. memb. 11. and ſays ſee 32 E. 3. Monſtraverunt 6. and Rot. Parl. 6 E. 3. No. 3.

4. Ancient demeſne is no exemption for ſerving the office of a high conſtable. 2 Show. 75. pl. 59. Trin. 31 Car. 2. B. R. the King v. Bettſworth.

accordingly, and ſeems to be S. C.

### (D) In Reſpect of the Perſon.

[1.] If a lord be a tenant, and lives in ancient demeſne, he ſhall be diſcharged for all his houſhold, having regard to the quantity of his tenement. 9 H. 6. 25. b.]

Fitzh. Toll, pl. 8. cites S. C. but S. P. does not appear.

### (E) In what Actions and Suits it will be a good Plea.

[1. *WHERE* by recovery in the action the land will be frank fee, ancient demeſne is a good plea. 8 H. 6. 35.]

S. C. and the S. P. ſeems admitted by Babington J.—Ibid. pl. 37. cites S. C. and S. P. ſeems admitted.—See pl. 18.

Br. Ancient Demeſne, pl. 20. cites

[2. In real actions ancient demeſne is a good plea. 8 H. 6. 1.]

Br. Ancient Demeſne, pl. 21. cites S. C. the tenant pleaded that the land was ancient demeſne, and pleadable in the court there by petit writ of right cloſe, &c. and demanded judgment if the court would take conſuſance.—4 Inſt. 270. cap. 58. S. P. accordingly.—It was agreed, that no freehold held in ancient demeſne, could be recovered in the court of the king, and that though the freehold were not to be recovered by the action, yet if the poſſeſſion was to be recovered by the action brought in the king's court, ancient demeſne is a good plea. 47 Hill. 10 Jac. in pl. 53. —2 And. 178. pl. 101. Hill. 43 Eliz. S. P. accordingly, and therefore it was held a good plea in ejectment. Smith v. Arden.—In all real actions it is a good plea. 4 Inſt. 270. cap. 58.

[3. In a writ of ward of land, ancient demeſne is a good plea. 46 Ed. 3. 2.]

10. cites 46 E. 3. 1. S. P. accordingly.—S. P. Hob. 47. in pl. 53. accordingly, and cites 46 E. 3. 1.—Br. Ancient Demeſne, pl. 7. cites 46 E. 3. 1. S. P. accordingly.—5 Rep. 105. 2. S. C. & S. P. cited accordingly, per cur.

Fitzh. Ancient Demeſne, pl.

[4. In a writ of meſne is a good plea, becauſe the tenancy may come in debate in this writ. \* 21 Ed. 3. 10. † 28 Ed. 3. 95. adjudged.]

S. P. accordingly, per tot. cur.—4 Inſt. 270. cap. 58. S. P.—S. C. cited accordingly, per cur. 5 Rep. 105. 2. † Fitzh. Meſne, pl. 17. cites S. C. & S. P. accordingly.—Fitzh. Ancient Demeſne, pl. 26. cites S. C. accordingly.

\* Br. Ancient Demeſne, pl. 16. cites S. C. &

[5. In

\* Br. Ancient Demesne, pl. 20. cites S. C. but S. P. does not appear there.

[ 5. In *replevin* ancient demesne is a good plea, because by intendment the freehold will come in debate. 4 H. 6. 19. \* 7 H. 6. 35. b. 21 Ed. 3. 10. 51. 29 Ed. 3. 9. 30 Ed. 3. 12. b. adjudged contra. † 17 Ed. 3. 52. 75. till the realty comes in debate, because he may traverse the taking.]

† Fitzh. Ancient Demesne, pl. 14. cites S. C. & S. P. — Br. Ancient Demesne, pl. 4. cites 40 E. 3. 4. S. P. agreed accordingly. — Godb. 63. pl. 76. cites S. C. agreed per cur. to be a good plea. — Ibid. pl. 7. S. P. said to be accordingly, and cites 46 E. 3. 1.

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— 4 Inst. 270. S. P. — Bulst. 108. Hill. 8 Jac. B. R. in a nota says it was agreed by the whole court, and that so is the book of 10 H. 7. 14. — Ow. 24 Pasch. 36 Eliz. C. B. in Owen's case, S. P. accordingly obiter, and cites 40 E. 3. 4.

Br. Ancient Demesne, pl. 20. cites

[ 6. In a writ of *account against a bailiff of a manor*, ancient demesne of a manor is a good plea. 8 H. 6. 34.]

S. C. but S. P. does not appear. — Ibid. pl. 37. cites S. C. but S. P. does not appear there. — Br. Ancient Demesne, pl. 7. cites 46 E. 3. 1. S. P. accordingly. — 14 H. 8. 5. 2. cites S. P. as adjudged in 46 E. 3. 2. because it is of the profits of the land, which is ancient demesne; which will follow the nature of the land itself. — 4 Inst. 270. S. P. — S. C. cited accordingly, per cur. 5 Rep. 105. 2. — S. P. Hob. 47. in pl. 53.

Br. Ancient Demesne,

[ 7. In an *assise* ancient demesne is a good plea. 7 H. 6. 35. b.]

pl. 20. cites S. C. but S. P. does not appear. — In *assise of rent issuing out of land in ancient demesne and land guildable*, there ancient demesne is no plea. Br. Ancient Demesne, pl. 3. cites 20 H. 6. 33. — And if assise be brought, and the lord of ancient demesne be named, there ancient demesne is no plea; for no ancient demesne can be in the hands of the lord. Ibid.

In *assise for a rent*, ancient demesne of the land is a good plea, because that court has authority to hold plea of the land out of which the rent issues, and therefore a fortiori, of the rent; Arg. D. 8. a. Trin. 28 H. 8. in pl. 14.

Br. Ancient Demesne,

[ 8. In a writ of *account against a guardian in socage* ancient demesne is a good plea, because the tenancy may come in debate, for the defendant may say, that the land is held by knights-service. 21 Ed. 3. 10. adjudged.]

accordingly, per tot. cur. — 5 Rep. 105. 2. S. P. accordingly, per cur. — And so [generally, as it seems] in actions of account, where by common intendment the realty shall come in question. 4 Inst. 270. cap. 58.

Br. Ancient Demesne,

[ 9. In a writ of *admeasurement of pasture* ancient demesne is a good plea, for though no land be demanded, yet by this the common shall be admeasured, and by this the land will be frank-fee. 8 H. 6. 34.]

pl. 20. cites S. C. & S. P. by Cottington, for by the judgment the land will be frank-fee. — Ibid. pl. 37. cites S. C. & S. P. by Cottington.

S. P. and S. C. cited,

[ 10. In a *partition* between tenants in common ancient demesne is a good plea, for though this does not demand land directly, yet upon the matter he demands it a latere, and so the recovery in this action will make it frank-fee. Tr. 12 Jac. B. between Grace and Grace, per curiam.]

and adjudged a good plea according to this case of Grace v. Grace, but because several discontinuances were found upon the record, judgment was given for the demandant. Raym. 249. Hill. 30 & 31 Car. 2. C. B. Pont v. Pont.

Br. Ancient Demesne, pl. 37. cites

[ 11. In *trespass for trampling his grass*, ancient demesne is no plea. 8 H. 6. 34.]

S. C. but S. P. does not appear there. — Thel. Dig. 114. lib. 10. cap. 24. f. 4. cites S. C. & S. P. accordingly. — S. P. and so of *cutting his trees*. Br. Ancient Demesne, pl. 7. cites 46 E. 3. 1. — S. P. by Warborton J. Cro. E. 826. in pl. 29. — It is no plea in trespass *Quare clausum fregit*; for by common intendment the title of the freehold will not come in debate. 4 Inst. 270.

This

This privilege does not extend to *mere personal actions*, as *debt upon a lease, trespass, Quare clausum fregit*, and the like, in which by common intendment the title of the freehold shall not come in debate. 4 Inst. 270. cap. 58.

[ 12. In a writ of trespass *quare columbare fregit, & columbas interfecit*, ancient demesne is no plea. 47 Ed. 3. 22. b.]

[ 13. In trespass *contra pacem*, though the realty comes in debate, yet ancient demesne is no plea, because they cannot hold plea in ancient demesne of a plea *contra pacem*. 17 Ed. 3. 52.]

Fitzh. Ancient Demesne, pl. 14. cites S. C. but

S. P. does not clearly appear.—In trespass *vi & armis*, so that the king is to have a fine, it is holden that ancient demesne is no plea; by Warburton J. Cro. E. 826. in pl. 29.—S. P. and so upon the statute 5 R. 2. though the freehold comes in debate, yet ancient demesne is no plea, and cites 46 E. 3. 1. and 2 H. 7. 17. and the cause is, as one book says, that the issue is upon the wrong; and the other book says the court of ancient demesne has no jurisdiction. Hob. 47. in pl. 53.—S. P. as to the stat. 5 R. 2. accordingly; for no land is to be recovered, but only damages. Br. Ancient Demesne, pl. 36. cites 2 H. 7. 17. and says that 21 E. 4. is accordingly.

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[ 14. In *detinue for a charter of feoffment* of certain land which is ancient demesne, and count of a bailment in a town which is ancient demesne, yet ancient demesne shall not be any plea. 3 Ed. 3. Kinere North', title Ancient Demesne 22. 43 Ed. 3. Ancient Demesne 35.]

Fol. 323.

[ 15. In an *affise by tenant by statute-merchant*, ancient demesne is no good plea, because the plaintiff does not demand the freehold, but [to hold the lands as chattle for a certain time] till he hath satisfaction. 2 Ed. 2. Ancient Demesne 24.]

\* Orig. is (tanque il avoit sue ses Chateaux par le statute,) and says the plaintiff had judgment to recover his seisin and his damages.—2 Inst. 397. cites S. R. Mich. 31 E. 1. coram Rege Ebor. Ranulp. de Huntingfield's case.—In affise brought by *tenant by elegit*, ancient demesne is a good plea. Br. Ancient Demesne, pl. 33. cites 22 Aff. 45.

The words

in Fitzh. Execution, pl. 118. S. C. are (tanque que il avoit sue ses Chateaux par le statute,) and says the plaintiff had judgment to recover his seisin and his damages.—2 Inst. 397. cites S. R. Mich. 31 E. 1. coram Rege Ebor. Ranulp. de Huntingfield's case.—In affise brought by *tenant by elegit*, ancient demesne is a good plea. Br. Ancient Demesne, pl. 33. cites 22 Aff. 45.

Note that the *statute which gives affise for tenant by elegit shall not extend to give it in ancient demesne*, and therefore there does not lie affise for tenant by elegit, though the sheriff makes execution there; for it appears elsewhere that the *sheriff cannot make execution in ancient demesne*; for he cannot meddle with the land. Br. Parliament, pl. 81. cites 22 Aff. 45.—And also Brooke says, it seems to him that there is another reason that they cannot have it there, which is, *because all their actions are by writ of right, and shall make protestation of what action be pleases, but this shall be only of an action given at common law*, and the elegit and affise for tenant by elegit is by statute, with which those who had consance of pleas before the statute, or the sheriff in his torn, steward in his leet, or such like, shall not meddle, unless the statute gives them authority by express words in those courts. Nota bene. Ibid.—S. C. cited 5 Rep. 105. b. per cur. accordingly, That where any interest in the land shall be bound, or that the realty shall come into debate, it is reasonable that those in ancient demesne, who best know to try and determine them, shall have consance thereof.—S. C. cited Hob. 48. and Hobart Ch. J. said he was of opinion, that though an affise could not lie in the king's court for one that has execution by elegit of land in ancient demesne, yet he may have affise in the court of the manor by writ of right-close, and protestation to sue it in the nature of an affise, though the affise in this case be given by the statutes.

[ 16. In a *juris utrum of his free alms*, ancient demesne is not any plea, for it cannot be ancient demesne and frankalmoign. 32 Ed. 1. Ancient Demesne 39.]

[ 17. In a *quare impedit* ancient demesne is no plea, because if it should be granted there should be a *failure of right*, for there they cannot grant a writ to the bishop. 7 H. 6. 35. b.]

Br. Ancient Demesne, pl. 20. cites S. C. and S. P. ac-

cordingly by Babbington.—Hob. 48. cites S. C. accordingly and for the same reason, and adds that the reason thereof is, because the common law, being as ancient as their privilege is, may not endure, that by pretence of privileges, there be a failure of original right as that case is. But of new rights or remedies brought in by statutes (which are not presumed to intepd the prejudices) it is otherwise.

[ 18. So



*Waste* was brought against tenant for life, and the tenant said that the lands are ancient demesne; and the opinion of the whole

court was,

that it is a good plea to the jurisdiction, because the plaintiff shall recover the place wasted. Br. Ancient Demesne, pl. 37. cites 8 H. 6. 34. — Br. Ibid. pl. 20. cites S. C. and 7 H. 6. 35.

[485] Action of *waste* upon the statute does not lie in ancient demesne, and if it was brought at the common law ancient demesne is a good plea; for those are not bound by the statute. And so see that ancient demesne is not excepted in the statute, and yet they are not bound by the statute. Br. Parliament, pl. 17. cites 8 H. 6. 34. 35. — Br. Parliament, pl. 101. cites S. C.

*Waste* lies by writ of right in ancient demesne, and shall have process at the common law, viz. Distress infinite. Per Boef and Littleton *quære inde*; for writ of waste was not at the common law. Br. Ancient Demesne, pl. 40. cites 32 H. 6. 25.

In action of waste the defendant made defence, and pleaded to the jurisdiction of the court, because the land was ancient demesne, and the defendant was ruled to plead over, because it is but a personal action; and per tot. cur. except Walmstey, the statute extends to ancient demesne; and cites 2 H. 7. 17. and 21 E. 4. 3. that ancient demesne is no good plea in an action on the statute of Gloucester. Ow. 24. Pasch. 36. Eliz. C. B. Owen's case. — Hob. 47. in pl. 53. cites 7 & 8 H. 6. that a writ of waste lies not in the king's court, though it be of a lease for years; and says the reason of the case of an action of waste 7 H. 6. 35. and 8 H. 6. 34. is, that if a new action be given by statute which lies in the king's courts, and will not lie in ancient demesne, yet if the action meddles directly with the possession, you shall rather lose your action than have it in the king's court to the prejudice of the privilege of ancient demesne.

19. Action by writ of right, according to the custom of the maner, cannot be brought by the tenant by elegit. The reason seems to be inasmuch as the elegit is given by the statute of *Westm. 2. cap. 18.* which is after the custom, which statute is general, and yet does not bind ancient demesne; and so see several statutes are which are general, and do not except ancient demesne, nor county palatine, nor the *Cinque Ports*, and yet by the reasonable intendment of the statute those shall not extend to them; and the reason also is, that men of those places do not come to the parliament as knights and burghesses, and therefore it seems that *cessavit* does not lie in those places. *Quære of writ of mesne with fore-judger.* Br. Parliament, pl. 99. cites 22 Aff. 45.

Lands in ancient demesne

20. Note, that land which is ancient demesne cannot be put in execution by the sheriff. Br. Parliament, pl. 99. cites 22 Aff. 45.

were adjudged to be extendable upon a statute-staple or statute-merchant. Mo. 511. pl. 351. cites it as about 25 Eliz. B. R. Martin v. Wilks. — Ibid. cites S. P. adjudged Hill. 11 Jac. C. B. Rot. 2541. Cox v. Barnesby. — 5 Rep. 105. b. S. P. accordingly per cur. obiter. — 2 Inst. 397. S. P. cites 7 H. 7. 1. — 4 Inst. 270. S. P. and that it is the same in *elegit*. cites 2 E. 1. Exe-  
cution 118. 15 E. 3. ibid. 62. 8 E. 5. ibid. 36. 7 H. 4. 19. 19 H. 6. 64. — Brownl. 224. Hill. 10 Jac. Coke v. Barnesby, S. P. held accordingly, that it is extendable for debts. Hob. 47. p. 53. Cox v. Barnesby. S. C. adjudged accordingly.

21. *Formedon in descender* is given by the statute, and yet ancient demesne is a good plea; per Cokain J. But per Martin J. those of ancient demesne cannot implead by action given by the statute; for they are not parties to the making of it, nor to the election



election of knights and burgeſſes, nor they do not contribute to the expences of them, ſo that this action does not lie there, *but they may have action according to their cuſtom*; for London has no action of waſte by the ſtatute; but note that they have action of waſte in their huſtings by their cuſtom. Br. Ancient Demeſne, pl. 20. cites 7 H. 6. 35. and 8 H. 6. 34.

22. *Rediſſeiſin after diſſeiſin* or writ of waſte does not lie in ancient demeſne; for they cannot award writ to the ſheriff to inquire of waſte, nor the ſheriff nor coroner cannot there inquire of the rediſſeiſin or after-diſſeiſin. Br. Waſte, pl. 141. cites \* 23 [32] H. 6. 25. per Boef and Littleton.

Br. Ancient Demeſne, pl. 40. cites 32 H. 6. 25. accordingly. \* All the editions of

Brooke are miſprinted (23) for (32;) beſides there is no ſuch year as 23 in the year-book. — 4 Inſt. 270. S. P. accordingly as to rediſſeiſin, becauſe the proceeding therein is by the ſtatute appointed to be made by the ſheriff *Alſumptis ſecum coronatoribus comitatus, &c.* and in ancient demeſne there are no coroners; but otherwiſe it is in an action of waſte.

23. In *ejectment* the defendant pleaded Ancient Demeſne. It was objected on demurrer that this action is in nature of treſpaſs, and ſo the plea not good; but adjudged that the plea is good in ejectment, becauſe by common intendment the right and title of the land may come in queſtion, and in this action the plaintiff ſhall recover the poſſeſſion of the land, and have execution by *Hab. fac. poſſeſſionem*. 5 Rep. 105. a. Hill. 43 Eliz. C. B. Alden's caſe.

2 And. 178. pl. 101. Smith v. 1 [486] Arden, S. C. adjudged a good plea. — Cro. E.

226. pl. 29. S. C. and Walmſley and Kingſmill held it a good plea, becauſe it touches the realty; but Warburton e contra, becauſe the action is merely perſonal. Anderson was abſent, and afterwards the demurrer was waived, and the defendant pleaded the General Iſſue. — S. C. cited per cur. Hob. 47. in pl. 53. — S. C. cited 2 Roll. Rep. 181. — S. P. 4 Inſt. 270. — S. P. by 2 juſtices accordingly, and agreed to by the whole court. Buſt. 108. Hill. 8 Jac. in a note there. — S. P. agreed per tot. cur. but otherwiſe after imparlance. Het. 177. Trin. 7 Car. B. R. Anon. — Ancient Demeſne is a good plea in ejectment; per cur. Comb. 40. Mich. 2 Jac. 2. B. R. Anon.

24. A man may ſue a writ of *warrantia charta* at the common law for a warranty made of lands in ancient demeſne. F. N. B. 135. (K).

And per Skipwith, the tenant ſhall have notes there

warranty againſt the lord in the lord's own court. F. N. B. 135. (K) in the new (b) cites 16 E. 3. Cauſe a remover 15. Reg. 12. 30 E. 3. 13.

25. In ejectment the defendant pleaded that it is *parcel of ſuch a manor, which is ancient demeſne, &c.* The plaintiff replied that the tenements mentioned are *pleadable at common law, abſque hoc* that thoſe tenements are parcel de antiquo dominico. Demurrer to it, and judgment for the defendant. Per cur. The traverse is ill; you ſhould have *traverſed* that the manor was antient demeſne; and that ſhall be tried by Domeſday Book; or elſe you ſhould have traverſed that thoſe tenements were held of that manor. Show. 271. Trin. 2 W. & M. Hopkins v. Pace.

Lill. Pr. R. fo. 8. ſays defendant cannot plead ancient demeſne without a rule of court for that purpoſe.

## (F) By Matter ſubſequent.

[ 1. ] In treſpaſs, if upon pleading the *freehold comes in debate*, ancient demeſne is a good plea. \* 46 Ed. 3. 1. b. Contra + 7 H. 6. 35. b. becauſe then the king will loſe his fine. Contra

\* Fitz. Ancient Demeſne, pl. 10. cites

S. C. as to trespass, but mentions nothing of the freehold's coming in debate. *tra* † 17 Ed. 3. 52. because the court there cannot hold plea of an action || *contra pacem*.]

S. C. but S. P. does not appear there.

† Br. Ancient Demesne, pl. 10. cites

but S. P. does not appear there.

† Fitzh. Ancient Demesne, pl. 14. cites S. C.

|| See (E) pl. 13. and the notes there.

It is no plea in an action of trespass where the freehold is to be recovered or brought in question, by Hobart and Winch. Brownl. 234. Hill. 10 Jac. in case of Coke v. Barnsley.

Fitzh. ancient demesne, pl. 10. cites S. C. but nothing of common is mentioned there.

[ 2. In trespass for trampling his grass, if the defendant justifies by force of a common, and so he did it sine injuria, ancient demesne is no plea, because the conclusion hath made the issue upon the personalty, not upon the common which touches the freehold. 46 Ed. 3. 2.]

—Br. ancient demesne, pl. 7. cites S. C. but nothing of common is mentioned there.—Hob. 47. pl. 53. it was urged per cur. that in trespass vi' & armis, or upon the statute 5 R. 2. though the freehold comes in debate, yet ancient demesne is no plea, and cites 46 E. 3. 1. and 2 H. 7. 17. and that the reason is, as one book says, that the issue is upon the wrong, and that the other book says, the court of Ancient Demesne has no jurisdiction.

## [487] (G) What Person may plead it. Who in respect of his Estate.

None shall plead ancient demesne but the tenant of the franktenement, and not a lessee for years. Fitzh. Ancient Demesne, pl. 9. cites S. C.—Br. Ancient Demesne, pl. 6. cites S. C. but I do not observe S. P. there.

[ 1. *A LESSEE* for years cannot plead ancient demesne. 41 Ed. 3. 22. b.]

None shall plead ancient demesne but the tenant, and not the disseisor, or the like. Br. Ancient Demesne, pl. 6. cites 41 E. 3. 22.—Br. Ancient Demesne, pl. 17. says, it seems that none shall plead it but the tenant, and cites 21 E. 3. 25.—Ibid. pl. 46. cites 21 Aff. 2.

Fitzh. Ancient Demesne, pl. 9. cites S. C. & S. P. for there it is to defeat the estate and make it ancient demesne again, and he cannot have writ of disceit to make it ancient demesne again where he himself is tenant or party.—Br. Ancient Demesne, pl. 6. cites S. C. & S. P.—Ibid. pl. 3. cites 20 H. 6. 33. S. P. accordingly.—The demesne lands of a manor, and the manor itself, which is called Ancient Demesne, is pleadable at common law, and in the Common Pleas. F. N. B. 11. (M)

Br. Ancient Demesne, pl. 6. cites S. C.—[ 3. So in an action against the lord and others, the lord cannot plead it, nor the others, because they are joined with him. 41 Ed. 3. 22.]

Fitzh. Ancient Demesne, pl. 9. cites S. C.

\* Br. Ancient Demesne, pl. 6. cites S. C. & S. P. accordingly, by Bulke.—Fitzh. Ancient Demesne, pl. 9. cites S. C. & S. P. accordingly.

[ 4. If the lord brings an action against the tenant, ancient demesne is no plea, for the action is brought to defeat the estate of the tenant, and to make it frank-fee. \* 41 Ed. 3. 22. b. Quære, for if the tenant bars the demandant by judgment, peradventure this will make the land frank-fee, which shall not be against the will of the tenant, although the lord agrees thereto. 1 Ed. 3. 14.]

(H) At what Time it may be pleaded.

Fol. 324.

[1. **A**T the Grand Cape returned the plaintiff released the default, ancient demesne is a good plea. 8 H. 6. 1.]

In præcipe quod reddat the demand-

ant at the Grand Cape released the default, and counted against the tenant, and he came and defended the tort and force, and demanded judgment if the court would take consance; for he said, that the land is held of one J. as of the manor of B. which is ancient demesne, and the land pleadable in the court there by petit writ of right close, time out of mind. Br. Ancient Demesne, pl. 21. cites 8 H. 6. 1.

[2. In a replevin after deliverance made by the sheriff, the defendant in banco may plead, that the place where, &c. is ancient demesne, &c. 30 Ed. 3. 12. b. adjudged.]

3. In formedon the tenant was not allowed to plead ancient Demesne after the view. Fitzh. Ancient Demesne, pl. 12. cites Hill. 50 E. 3.

But in præcipe quod reddat, after the view

the tenant said, that the land is held of the manor of D. which is ancient demesne, and pleadable, &c. Judgment if the court will take consance, and there it was agreed that he may plead this plea after the view; for it is a plea which comes upon the view; and so see a plea to the jurisdiction after the view. Br. Ancient Demesne, pl. 10. cites 50 E. 3. 9.

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4. The prayee in aid shall not plead ancient demesne, because the tenant has affirmed the jurisdiction before by the aid-prayer. Br. Ancient Demesne, pl. 15. cites 11 H. 4. 85.

5. Fine by tenant in tail was reversed by writ of disceit. The issue in tail is remitted, and shall avoid all estates made by him; for the fine is void between the parties, but he must sue a sci. fa. against any that has a freehold. Cro. E. 471. [bis] pl. 33. Pasch. 38 Eliz. B. R. Cary v. Dancy.

Br. Fines, pl. 47. cites 21 E. 3. 20.

6. It is a good plea in ejectment, but not after imparlance, agreed by all. Het. 177. Trin. 7 Car. C. B. Anon.

S. P. in ejectment, but the

court doubted if good, because such lands are not impleadable at the common law, and therefore it came timely enough when he had not pleaded any other plea; sed curia advisare vult. Cro. C. 9. pl. 8. Pasch. 1 Car. C. B. Marshall's case.—Palm. 406. Marshall v. Allen, S. C. cites it as adjudged Trin. 4 Jac. CLARKE v. HAMPTON, that ancient demesne was no good plea after imparlance; but in the principal case Doderidge held, that though in other cases a plea to the jurisdiction is not good after imparlance, yet it is otherwise in ancient demesne, because if judgment be given in B. R. the lords will reverse it by disceit, and the judgment will be voidable; and Jones said that this seemed a reasonable opinion.—Lat. 83. S. C. and seems taken from Palm.—D. 210. b. pl. 27. cites S. C.

(I) What Act or Thing will make it Frank-fee.

[1. **S**OME books are, generally, that a fine levied in the king's court will make it frank-fee. F. N. B. 13. C. 7 H. 4. 3. b. 28.]

Shewing a fine levied in the king's

court of the same land, is a good cause to prove the lands to be frank-fee. F. N. B. 13. (C) —[And therefore] a recovery in the court of ancient demesne of lands which were made frank-fee before by a fine levied at common law was falsified for this cause. Br. Ancient Demesne, pl. 12. cites 7 H. 4. 3.—And though the king be lord of such manor, yet such fine will make it frank-fee, and he shall be put to his writ of disceit as well as a common person.

Br. Ancient Demesne, pl. 13. cites 7 H. 4. 27.—If a fine and recovery be levied or suffered thereof in C. B. this makes the land frank-fee so long as they stand in force. 4 Inst. 269, 270. cap. 58.

If a fine be levied by the tenant of ancient demesne, the nature of the tenancy was changed for the time, and the lord had lost his seignior for the time the fine stood in force unrepealed; but yet every other who is to demand by title paramount shall have action in ancient demesne. Fitzh. Cause de remover plea, pl. 10. cites Mich. 50 E. 3. 24 per Kirton.—Such tenant shall not have the privilege till the fine be reversed; per Clench; quod fuit concessum. 2 Le. 192. Trin. 28 Eliz. in pl. 240.

So if one party pleads it, the other shall be compelled to answer to it. Br. Ancient Demesne, pl. 4. cites S. C.—Fitzh. Ancient Demesne, pl. 8. cites S. C. & S. P. accordingly.—F. N. B. 13. (C) in the new notes there (a) at pag. 28. of that new edition, cites S. C. [but misprinted 40.] and S. P. per Thorp and Thirn.

If a Fine be levied sur consance de droit and release, hereby [ 3. So a fine upon a release with warranty to the tenant, will make it frank-fee, because he is estopped to say it is ancient demesne against the fine, in which he affirms the jurisdiction of the court in which it is levied. 21 Ed. 3. 25. adjudged.]

there is no transmutation of the possession, nor is the tenancy altered as to the lord, &c. (or any stranger to the fine) cites 40 E. 3. 4. per Candish, but Belk. contra, cites 18 E. 2. Ancient Demesne 37. but as to the parties themselves, the tenancy is changed by way of estoppel, per Wilby; and so it was adjudged; for if such consor brings an assise against the consor, or e converso, no exception of ancient demesne lies. 21 E. 3. 25. F. N. B. 13. (C) in the new notes there. (a)

[ 489 ] And therefore if the lord be a party, by such fine the tenancy is changed, and also he shall never have a writ of disceit. F. N. B. 13. (C) in the new notes there (2) cites 30 E. 3. 13. b. or 17. per Green.

Br. Ancient Demesne, pl. 15. cites [ 4. A recovery at the common law in an assise will make it frank-fee. 11 H. 4. 86.]

S. C. but I do not observe S. P. there.—Shewing a recovery had in the king's court in a præcipe quod reddat, &c. is a good cause to prove the lands to be frank-fee. F. N. B. 13. (C) —By a recovery of land at common law it becomes frank-fee for ever; but a recovery against the tenant is reversible by the lord by writ of disceit; and such a recovery makes it only frank-fee quousque it continues unreversed; but where it is reversed it becomes ancient demesne again. 1 Salk. 57. pl. 2. Hill. 12 W. 3. B. R. Hunt v. Burne.

Fitzh. Ancient Demesne, pl. 8. cites S. C. accordingly.—Br. Ancient Demesne, pl. 4. cites S. C. and S. P. accordingly, and that it is the same if it be upon render. [ 5. So fine upon a release without warranty will make it frank-fee. Dubitatur. 40 Ed. 3. 4. b.]

[ 6. If the tenant levies a fine in a writ of warranty of charters, this does not make the land frank-fee, because the land does not pass by this. 21 Ed. 3. 32. b.]

[ 7. If the tenant levies a fine of this without any original writ, yet this will make the land frank-fee till it be reversed, for this is not void, but only voidable. 26 H. 8. Assise 13. adjudged.]

\* Br. Ancient Demesne, pl. 32. cites S. C. accordingly. [ 8. If a manor of ancient demesne comes to the king, and he alien the manor to another, the tenements held of the manor continue ancient demesne as they were before, for the king passes only the services of them, but the demesnes are frank-fee. 21 Ed. 3. 56. \* 21 Ass. pl. 13.]

[ 9. If the land comes to the king this makes it frank-fee. \* 17 Ed. 3. 52. 75. b. 21 Ed. 3. 46. b.

Contra 18 Ed. 3. 19. 21 Ed. 3. 56. † 21 Aff. pl. 13. adjudged.]

\* Fitzh. Ancient Demesne, pl. 14. cites S. C. accordingly.

† Br. Ancient Demesne, pl. 32. cites S. C. and S. P. accordingly, that the land of the tenants coming into the hands of the king or of the lord, does not change the nature of it if he does not make feoffment thereof.

[ 10. If the land which is ancient demesne comes to the king, this makes the land frank-fee, and if the king leases it for life, yet it will be frank-fee. 11 H. 4. 86. a. b.]

Br. Ancient Demesne, pl. 15. cites S. C. and S. P. accordingly.

[ 11. So if he grants it over in fee rendering rent, or without rent, it will be frank-fee. \* 17 Ed. 3. 52. 75. b. 21 Ed. 3. 46. b. 56. † 21 Aff. pl. 13. adjudged.]

\* Fitzh. Ancient Demesne, pl. 14. cites S. C. and

S. P. seems admitted.

† Br. Ancient Demesne, pl. 32. cites S. C. but S. P. does not appear.

[ 12. If the lord infeoffs another of the tenancy, this makes the land frank-fee, because the services are extinguished perpetually.

\* 41 Ed. 3. 22. b. † 50 Ed. 3. 10. 3 H. 6. 47. 18 Ed. 3. 19. 30 Ed. 3. 12. b. admitted. 19 R. 2. Ancient Demesne 41. Curia.]

\* Br. Ancient Demesne, pl. 6. cites S. C. and S. P. by

Belke.—Fitzh. Ancient Demesne, pl. 9. cites S. C. and S. P. by Belke.

† Fitzh.

Ancient Demesne, pl. 12. cites 50 E. 3. but is a D. P.—Br. Ancient Demesne, pl. 10. cites S. C. The tenant pleaded that the tenements in demand are not held of the manor and so frank-fee. Sidenham said this may be true, and yet the land may be ancient demesne, as by feoffment before the statute, or by gift in tail after the statute the donee or feoffee held of the donor or feoffor, and yet the land is ancient demesne; for it is held of the manor by a mesne though it be not held immediately; but Clopton e contra, and that when the lord cannot call them to his court the ancient demesne is gone. Br. Ancient Demesne, pl. 10. cites 50 E. 3. 9.

|| Fitzh. Ancient Demesne, pl. 1. cites S. C. but S. P. does not appear.—Br. Ancient Demesne, cites S. C. but S. P. does not appear.

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[ 13. So if he leases for life without deed. 50 Ed. 3. 24. b.]

Fitzh. A-vowry, pl.

59. cites Hill. 49 E. 3. S. C. And Br. Ancient Demesne, pl. 11. cites 50 E. 3. 24. S. C. but I do not observe any thing of its being (without deed) in either of those books.—Fitzh. Cause de Remover Plea, pl. 10. cites S. C. and S. P.

[ 14. So if the lord releases to the tenant all his right in the tenancy, this makes the land frank-fee. 49 Ed. 3. 7. b. 50 Ed. 3. 10.]

Fitzh. Ancient Demesne, pl. 12. cites

Hill. 50 E. 3. but S. P. does not appear there.—Br. Ancient Demesne, pl. 10. cites 50 E. 3. 9. S. C. and S. P. accordingly by Clopton, and agreed by Tresilian.

[ 15. So if the lord confirms to him to hold by certain services at the common law, this makes the land frank-fee. 49 Ed. 3. 7. b. Ancient Demesne 59.]

The case recordare was sued by Th. B. to remove the

parol out of ancient demesne by charter of the lord, which willed, That where the said Th. B. held of him two houses and five rodd of land in W. in ancient demesne according to the custom of the manor, the lord by deed of dedi & concessi & confirmavi terras predictas to the said Th. B. in fee, & quod banc habeat libertatem quod ipse & hæred' sui habeant & teneant præd' præmissa de se & hæred' suis per servic' 7 s. pro omnibus serviciis, auxiliis, finibus, tallag' mercat' & omnibus aliis secularibus demandis ad communem legem with warranty to him and his heirs to hold as at common law, and bore date anno 45 E. 3. and the other said that he is a stranger to this deed made between the lord and tenant, and therefore he is not bound by it, and said that the land was ancient demesne, &c. & non allocatur, but was compelled to answer by award, and then he said that this land was made to the feisin of the re-

nant,

nant, he then being seised, and so it is only a confirmation, and yet per Belk. this makes the land frank-fee and pleadable at the common law. Brooke says, and so see that a lord may *alter the nature by his confirmation* but not the estate of the tenant, and by him if the title of the demandant be elder than the confirmation, he shall sue in ancient demesne, and, if he recovers, the land shall be ancient demesne as at first; for the possession, upon which the confirmation is made, is destroyed, & adjournatur. Br. Ancient Demesne, pl. 8. cites 49 E. 3. 7. — Br. Confirmation, pl. 5. cites S. C. — Fitzh. Avowry, pl. 59. cites Hill. 49 E. 3. S. C. and S. P. accordingly. — S. P. though the estate of the tenant be not changed, nor any transmutation of possession for the tenant, yet the quality of his estate is changed, and shall never afterwards be impleaded by a petit writ of droit-cloze, and the land by the confirmation is discharged of the customs of the manor. 9 Rep. 140. a. in Beaumont's case, cites 49 E. 3. 7. a. b.

[ 16. If the lord grants the services of a tenant of a manor in Fol. 325. ancient demesne, and the tenant attorns, this makes the tenancy to be frank-fee. \* 50 Ed. 3. 10. 30 Ed. 3. 13.]

\* Fitzh.

Ancient Demesne, pl. 12. cites 50 E. 3. but S. P. does not appear. — Br. Ancient Demesne, pl. 10. cites S. C. and S. P. by Tresilian; for his seignior is determined. — 4 Inst. 270. cap. 58. S. P.

\* Br. Ancient Demesne, pl. 3. cites S. C. but

[ 17. If the lord disseises the tenant, this makes the land frank-fee against him as long as it is in his hands. \* 20 Hen. 6. 33. † F. N. B. 12 E. † 41 Ass. 7.]

S. P. does not clearly appear.

† F. N. B. 12. (E)

† Br. Ancient Demesne, pl. 34.

cites S. C. but S. P. exactly does not appear. — Fitzh. Ancient Demesne, pl. 18. cites S. C. and S. P. — But if the tenant recovers against the lord before feoffment, this makes it ancient demesne again. Br. Ancient Demesne, pl. 6. cites 41 E. 3. 22. — Br. Ancient Demesne, pl. 10. cites 50 E. 4. 9. S. P. — If the lord disseises his tenant and makes a feoffment, and the tenant recovers or re-enters, yet the land is frank-fee; for the seignior is gone. Br. Ancient Demesne, pl. 10. cites 50 E. 3. 9.

\* Br. Ancient Demesne, pl. 34. cites S. C. &

[ 18. But this shall not bind the tenant but at his election; for he may have a writ of right-cloze against him if he will. F. N. B. 12 [E.] 30 Ed. 3. 13. \* 41 Ass. 7.]

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S. P. as to the election of the tenant, but no mention of a disseisin of the tenant by the lord. — Fitzh. Ancient Demesne, pl. 18. cites S. C. & S. P. per Wiche. accordingly; but that it is e contra if the lord be disseised by the tenant. — Fitzh. Ancient Demesne, pl. 9. cites 41 E. 3. 22. S. P. by Cheld.

Fitzh. Ancient Demesne, pl. 18. cites S. C. &

[ 19. That which comes to be parcel of the demesnes of the manor is frank-fee; for if the lord be disseised thereof he ought to have an assise at common law. 41 Ass. 7. adjudged.]

S. P. — Br. Ancient Demesne, pl. 34. cites S. C. & S. P. accordingly.

[ 20. If the lord infeoffs another of the tenancy, saving the ancient services, this makes the land frank-fee; for he cannot hold it by the ancient services. 19 R. 2. Ancient Demesne 41.]

[ 21. If a plea be removed into bank out of an ancient demesne court, because the lord will not suffer right to be done there, this makes the land frank-fee always. 11 Ed. 3. Cause de remover, plea 21.]

Fitzh. Ancient Demesne, pl. 30. cites S. C. &

[ 22. If the lord acknowledges a fine in a monstraverunt, and by this abridges the services of the tenant, this makes the land frank-fee. 30 Ed. 3. 13. b.]

S. P. by Fish. — A release was made by fine by the lord to the tenant of the land, in E. 2d's time, De omnibus servitiis & consuetudinibus salvis servitiis infra scriptis (viz.) pro una virgata terra 2 s. rent, Sec. cur. & relevio, and the release was De uno mesuagio & una virgata terre. The custom of 207



cient demesne is *extinct* by the release, but the rent, suit of court, and relief remain by the saving, as the remnant of the ancient seignior. Adjudged. Mo. 143. pl. 285. Mich. 25 & 26 Eliz. Griffith v. Clerk.

[ 23. If the lord *by deed confirms to the tenant, to hold freely by the services before due*, this makes the land frank-fee. 30 Ed. 3. 13.] Fitzh. Ancient Demesne, pl. 30. cites S. C. accordingly.

[ 24. [So] If the lord confirms to the tenant to hold freely *by certain services for all services*, this makes the land frank-fee, because the ancient customs are changed, and he shall hold according to the deed. Dubitatur 30 Ed. 3. 12. b.] Fitzh. Ancient Demesne, pl. 30. cites S. C. & S. P.—

See pl. 25. the S. P.

[ 25. If the lord by deed confirms to the tenant to hold by certain services for all services, this will make the land frank-fee, because he is now to hold according to the deed. 21 Ed. 3. 32. b.] Br. Ancient Demesne, pl. 18. cites S. C. that

[ 26. [So] If the lord confirms to the tenant *to hold by less services*, this will make the land frank-fee. 21 Ed. 3. Cause de remover, plea 18.] plea was removed out of ancient demesne, be-

cause the tenant claimed to hold the lands at common law, and at the day the parties came, and the tenant set forth a deed of confirmation, in proof, &c. that the lord had confirmed his estate to hold by certain services for all services; and the best opinion was, that the confirmation does not alter the estate nor nature of the land, and thereupon the tenant pleaded other plea.—Fitzh. Ancient Demesne, pl. 30. cites 30 E. 3. 12.

[ 27. If the lord *joins with a tenant in a fine, upon a writ of warranty of charters* of the land, this will make the land frank-fee. 21 Ed. 3. 32. b.]

[ 28. If the lord *by fine acknowledges the tenancy to be the right of the tenant, Come ceo que il ad de son done*, this makes the land frank-fee. 30 Ed. 3. 13. b.] Fitzh. Ancient Demesne, pl. 30. cites S. C. &

S. P. accordingly, by Greene.

[ 29. If the lord *warrants to the tenant the ancient customs*, this does not make the lands free. 30 Ed. 3.] [ 492 ]  
Fitzh. An-

[ 30. If the lord *confirms to his tenant to hold by certain services for all services during his life*, this will make the land frank-fee during his life; but this will be ancient demesne again after his death. 21 Ed. 3. 33.]

[ 31. If the lord *makes an acquittance to the tenant of the services for a certain time*, it seems this makes the land frank-fee for the time. Contra 30 Ed. 3. 13. b.]

[ 32. In a *præcipe quod reddat* of land in ancient demesne, if the tenant *\* answers to the action*, yet the land is not frank-fee by this, unless judgment be given thereupon. 2 Ed. 4. 26.] \* Br. Ancient Demesne, pl. 38. cites S. C. and

says it was agreed that render of [or confessing the action by] the tenant for life, does not make the land to be frank-fee, unless judgment be given. \* The word in Roll is (Respondera f action,) but seems to be misprinted for (Rendra) viz. renders the action.

33. A writ of right-close is brought, and pendant the writ the tenant accepts a fine sur conusance de droit come ceo, &c. yet the land remains ancient demesne as to that action, because he has affirmed his plaint before the fine; and so it was holden. F. N. B. 13. (C) Marg, in the English editions, cites 12 H. 7. Rot. 103.

Fol. 326. (K) [*What Act, &c.*] By whom. [*Will make it*]  
Frank-fee.

Br. Ancient Demesne, pl. 14. cites S. C. but I do not observe S. P. there. — Fitzh. Cause de Remover Plea, pl. 10. cites S. C. but I do not observe S. P. there. — S. P. per Clench, quod fuit concessum. 2 Le. 192. in pl. 240.

[ 1. ] If the tenant levies a fine of the land, this makes it frank-fee till the lord has repealed it by a writ of disceit. 50 Ed. 3. 25.]

See (I) pl. 10, 11. S. P. [ 2. If the king makes a feoffment of the land, this makes it frank-fee. 2 Ed. 3. 40. b. per Scroop,]

See (I) pl. 11, 12. S. P. [ 3. [So] if the lord of a manor makes a feoffment of ancient demesne land, this makes the land frank-fee. 2 Ed. 3. 40. b. per Scroop,]

This is misprinted; for there are not so many pages in that year.

(L) [*What Act, &c.*] To whom [*will make it*]  
Frank-fee.

[ 1. ] If the lord confirms to the disseisor of the tenant to hold at common law, if the disseisee re-enters or recovers, the land shall be ancient demesne again. 49 Ed. 3. 9.]

[ 493 ] [ 2. But in 50 Ed. 3. 10. 25. it is held, if the lord disseises the tenant, and makes a feoffment, and after the tenant recovers in ancient demesne, yet the seigniority is not revived.]

Fitzh. Ancient Demesne, pl. 12. cites 50 E. 3. but S. P. does not appear there. — Br. Ancient Demesne, pl. 10. cites 50 E. 3. 9. S. C. & S. P. accordingly, by Clopton, and agreed by Tresilian. — Br. Ancient Demesne, pl. 6. cites 41 E. 3. 22. S. P. — The coming of the land into the hands of the lord does not change the nature of it, unless he makes a feoffment thereof. Ibid. cites 21 Aff. 13.

Fitzh. A. vowry, pl. 59. cites 49 E. 3. S. C. [ 3. If the land be made frank fee as to those in possession, yet it shall not be said to be frank-fee as to those who claim paramount this making of it frank-fee. 50 Ed. 3. 24. b.]

and S. P. accordingly, by Perlay. — Br. Ancient Demesne, pl. 11. cites S. C. & S. P. accordingly.

[ 4. If the king seises land in ancient demesne without title, and aliens it to another to hold of him, if after the patent be repealed, and he, that hath the right, restored to the land, the land shall be ancient demesne again. 21 Ed. 3. 46. b.]

5. If the custom within a manor of ancient demesne was that the youngest person shall inherit the land held by the custom, though the lord releases or confirms to hold by less service, so that he has lost the

the feigniory of ancient demeſne, yet becauſe the nature of the tenancy is not changed, having regard to the nature of the inheritance, (for the youngeſt ſon ſhall have the lands as he had before) but as againſt the lord it is changed ſo that it ſhall not be ancient demeſne. Fitzh. Avowry, pl. 59. cites Hill. 49 E. 3. by Kirton.

(M) *By whom it may be made Frank-fee.*

[ 1. ] **I**F the tenant in ancient demeſne makes a feoffment in fee, and the king confirms it, this ſhall not bind the lord, as it ſeems, without his conſent, but he may avoid it. Contra 1 Ed. 3. 5. but quære.]

[ 2. [So] If the tenant in ancient demeſne makes a feoffment in fee by leave of the king, given by charter, yet this does not make the land ancient demeſne [frank-fee] without ſhewing the charter of feoffment of the king, or the lord of the manor. 2 Ed. 3. 40. b.]

(N) *What Perſons ſhall be bound by making it Frank-fee.*

[ 1. ] **I**F land in ancient demeſne held of the king he made frank-fee by a fine levied, this will bind till the king avoids it. \* 7 H. 4. 29. † 11 H. 4. 86. b.] \* Br. Ancient Demeſne, pl. 13. cites 7 H. 4. 27. S. C. & S. P. and the king ſhall be put to bring a writ of diſceit as well as a common perſon. † Br. Ancient Demeſne, pl. 15. cites 11 H. 4. 85. S. C.—Br. Diſceit, pl. 37. cites S. C. but not directly S. P. but is, that if the tenant ſuffers the land to be recovered at common law in a præcipe quod reddat, and will not plead ancient demeſne, the king ſhall have action of diſceit.

2. Although a fine be levied by a diſſeiſor, yet the diſſeiſee, as it ſeems, ought to ſue at common law, but when he has recovered the tenements they ſhall be ancient demeſne again, cites 3 E. 3. 33. and therefore if in ſuch caſe judgment be given in the court of ancient demeſne, and the recoveror enters, in treſpaſs brought againſt him for this entry, he cannot juſtify by force of the recovery there, for it was coram non judice. F. N. B. 13. (C) in the new notes there (a) in pag. 28. of that new edition, cites 7 H. 4. 3. accordingly. [ 494 ]

(O) In what Cases it may be *made Ancient Demesne again without a Writ of Disceit.*

[ 1. ] IF a *fine sur render* be levied of land which is ancient demesne, the *claim of the lord within the year* will not avail to save the nature of the tenancy, because every claim supposes a subsequent action. 1 Ed. 3. 5. 26.]

1 Salk. 210.

pl. 1. Mich.

9 W. 3. C.B.

S. C. but

S. P. does

not appear.

—3 Salk.

35. S. C. but

2. A *scire facias* does not lie to reverse a fine levied in C. B. of lands in ancient demesne, but it must be by original writ of disceit sued out of Chancery; for the lord was not party to the record of the fine, and that fine was reversed. 3 Lev. 419. Trin. 7 W. 3. C.B. Zouch v. Thompson.

—Ld. Raym. Rep. 177. S. C. but S. P. does not appear.

(O. 2) Jurisdiction of the Court.

S.P. as to grand assise and foreign voucher, and so if he pleads a foreign plea, which cannot be tried in the

1. IF the tenant in ancient demesne puts himself in grand assise in writ of right it shall be removed, and yet the land shall remain in ancient demesne as before; for there they cannot do the parties justice without permitting removal, where they themselves cannot make grand assise. So of a foreign voucher. Br. Ancient Demesne, pl. 35. cites 1 H. 7. 30. per Catesby and Townsend.

lordship there, then a *superfedeas* shall be granted out of the Chancery, directed unto the lord of ancient demesne, or his bailiffs, if the writ were directable to the bailiffs, that they should surcease, &c. and the party defendant shall sue his writ of warranty of charter, against the vouchee, &c. F. N. B. 13. (G) — The plea shall be removed to be tried, and afterwards remanded to be adjudged, 14 H. 4. 26. And cites 19 H. 6. 53. that on a foreign voucher day was given to the party himself in C. B. to determine his warranty, and there a summons ad warrantizand' issued and the vouchee came and vouched over B. who entered into warranty and vouched over, cites 5 Ed. 6. Dy. 69. See the tenant in a writ of right-cum assise sued in nature of a writ of right at common law, and puts himself on the grand assise; and therefore the plea was removed by recordare; but it was afterwards remanded by the court; for by the custom they may elect a jury instead of the grand assise, STAFFORD'S CASE, Dyer 111. See 1 H. 7. 29. contra. F. N. B. 13. (G) in the new notes there. (b)

Br. Execution, pl. 26. cites S. C. — Br. Ancient Demesne, pl. 44 cites

2. Where a man recovers land and damages in assise in ancient demesne court, which is only a court baron, there upon execution the bailiff may sell the beasts and deliver the money to the recoveror in execution of his damages, notwithstanding that 4 H. 6. 17. be to the contrary. And per Huls, if a man recovers damages in ancient demesne, the bailiff may make execution in land which is frank-fee held of the manor, viz. in taking of beasts there for the damages. Br. Court Baron, pl. 3. cites 7 H. 4. 27.

After judgment in ejectment, for lands held in ancient demesne a writ of execution was awarded out of B. R. to the suitors, who returned that they did not execute the writ, because the land was frank fee, as it appeared to them by a transcript of a fine to them shown; but this return was disallowed, because the parties themselves had allowed the jurisdiction of the court at first; and this of the frank-fee ought to have been pleaded that the other party might have answered to it, which he cannot after judgment. Mo. 451. pl. 615. Pasch. 38 Eliz. Gybon v. Bowyer.

3. In ancient demesne are frank-tenants and customary-tenants who held by copy of court-roll, and the *frank-tenants shall have monstraverunt and writ of right close*, and the *copy-tenants shall have only plaint in the base court there*, nota. Br. Ancient Demesne, pl. 41. cites F. N. B. 11. 12.

Frank tenants in ancient demesne shall implead and be impleaded, thereof their

land in the court of ancient demesne by writ, and copy-tenants by bill, and not otherwise, per *judicium curie*. And Hank. said it was well debated in parliament, and agreed there similiter, and yet the custom of the manor was that the copy-tenants shall implead there by writ; and per tot cur. this is contrary to law, and not allowable; and for this cause a writ of false judgment brought in such case of copyhold was abated by award; quod nota. Br. Ancient Demesne, pl. 45. cites 14 H. 4. 33.—F. N. B. 12. (B) in the new notes there (a) cites 14 H. 4. 34. and 1 H. 5. 12. and Nat. Brev. 16.—And *ibid* (b) says note 14 H. 4. 34. it was adjudged, That if one recovers against tenant by the verge in ancient demesne by writ of right-close, the tenant shall not have a writ of false judgment, nor assign this for error, for then he should be restored to a freehold which he never lost, but always continued in the lord. But it seems the recovery is void and may be avoided by plea, cites 1 H. 5. 12. And so it is though they are lands at common law. 18 H. 6. 23.

4. Note by Boese and Littleton, that *waste lies by writ of right* in ancient demesne, and shall have *process in infinitum*; quære inde. Br. Tenant per Copie, &c. pl. 23.

5. Recordare to remove a plea out of ancient demesne, which is there without writ. It was objected that this is not well removed; for ancient demesne cannot hold *plea of land without writ*; but Fitzh. said that they may hold *plea of assise of fresh force* without writ and otherwise, as they do in ancient boroughs, and therefore well removed; quod quære. Br. Ancient Demesne, pl. 1. cites 26 H. 8. 4.

6. A *writ of right-close* was directed to the bailiffs of the manor, and the *plaintiff recovered*. The tenant brought a writ of *false judgment*, and assigned for *error that the writ was directed to the bailiffs*, whereas it appears by the record that the court was held before the suitors and not before the bailiffs; but the judgment was affirmed. 3 Le. 63. pl. 94. Hill. 19 Eliz. C. B. Abrahall v. Nurse.

Bendl. 279. pl. 287. S. C. and the pleadings, and says that that error was not allowed.—S. C. cited

Lutw. 714. Arg. and says the judgment was affirmed upon good consideration, though the error assigned was objected as strong as possibly it could be.

This court is in nature of a court baron wherein the suitors are judges, and is no court of record, for *Brevia clausa recordum non habent*. 4 Inst. 269.

Though the writ is directed to the bailiffs, yet the suitors are the judges. F. N. B. 11. (G) in the new notes there (a) cites Mich. 17 & 18 Eliz. Rot. 1381.

7. The plaintiff's bill is to be relieved for copyhold lands, the defendant doth demur for that the lands are ancient demesne lands of her majesty's manor of Woodstock, and there only pleadable, it is ordered a subpoena shall be awarded to the defendant to make a better answer. Cary's Rep. 122. cites 21 & 22 Eliz. Wilkins v. Gregory.

8. An action of maintenance in the nature of an action of trespass lies in ancient demesne. 2 Inst. 208.

9. Nota, the demandant in a writ of right-close cannot remove the plea out of the court of the lord for any cause, the tenant may remove the same for 7 causes, viz. 1st, for that he boldeth it *ad communem legem*, as if a fine or recovery be levied or suffered thereof in the court of C. B. this maketh the land frank-fee so long as they stand in force. 2dly, If the land be not holden of the manor, being

S. P. as to the demandant, nor can the tenant re-

move the plea out of the lord's court, unless for causes which prove the land to be frank-fee, and not ancient demesne.

F. N. B. 13.  
(B) ———

ancient demesne. 3dly, If the land be *holden by knights service*; for as has been said, the service of the plow and husbandry is the cause of the privilege. 4thly, If there be *no suitors, or but one suitor*; for that the suitors are judges, and therefore the demandant must sue at the common law, for that there is a failure of justice within the manor. 5thly, If the *tenant accepts a release* of his lord of his feigniory, *or the feigniory be otherwise extinguished*, by reason of the seisin of the king, or otherwise. 6thly, Or if the *lord dis- seises his tenant, and makes a feoffment in fee*. 7thly, If the lord *grants the services of his tenant, and the tenant attorns*. 4 Inst. 270.

And *ibid.* in the new notes there (a) cites 34 H. 6. 35. accordingly, per cur. But cites 2 E. 3. 29. contra; but says that *ibid.* 35. seems to agree; and cites also 3 H. 4. 14. where he is but bailiff he may maintain the plea, or if he be party the parol shall be remanded; yet if the bailiff be cousin and heir to the plaintiff, it is good cause of removal. Yet see 6 H. 4. 1. that he was bailiff of the robes to the plaintiff was held no cause of removal, per cur. and therefore remanded, and if the court does not do right, he is put to his writ of false judgment, 12 H. 4. 17. 13 H. 4. 14. Nor is it cause of removal that the process there was misawarded, 9 H. 6. 25. Nor when the bailiff is demandant, 11 H. 6. 10. per cur.

Ancient Demesne is no plea in ejectment for copyhold lands.

10. *Franktenements holden of the manor*, are only pleadable in the court of the lord; but *copyholds*, which are parcel of the manor, are pleadable at the common law. Admitted. 3 Lev. 405. Mich. 6 W. & M. in C. B. Smith v. Frampton.

Ld. Raym. Rep. 43. Pasch. 7 W. 3. in C. B. Brittel v. Bade. ——— 1 Salk. 145. pl. 4. Brittle v. Bade, S. C. accordingly.

### (O. 3) The Force and Effect of Fines in Ancient Demesne, and of Fines at Common Law of Ancient Demesne Lands.

Dal. 12. pl. 21. Pasch. 7 E. 6. S. C. held accordingly by Hales, because this custom

1. **L**ANDS in ancient demesne, which are *partible* between heirs males, are *aliened by fine levied at common law*. The question was, whether the course of inheritance is thereby altered, and made descendible to the heir at common law. It seemed by the better opinion that it is not. D. 72. b. pl. 4. Mich. 6 E. 6. Anon.

goes with the land, and not in respect of the feigniory which is ancient demesne; for if the lord himself purchases these lands, his heirs shall inherit together, and yet in his hands the land is frank-fee. But Mountague Ch. J. e contra, and said that it is not like to the custom of Gavelkind; but Browne J. agreed with Hales.

And. 71. pl. 144. Elmes's case, S. C. argued, and says the tenant died before judgment, which thereupon was stayed,

2. The *tenant in tail* of franktenement in ancient demesne, *levied a fine* there on a plea of covenant *secundum consuetudinem manerii*, which is without proclamation; and *in a formoden* there brought the *tenant pleaded the fine* to be a bar to the tail by the custom, and judgment there given accordingly; upon which a writ of false judgment was brought, and if the custom of barring tails be averrable against the statute de donis, which is within memory, was assigned for error. No judgment was given, but the reporter adds a nota, That if the judgment be reversed in C. B. the plain-  
tiff



iff shall not have judgment there to recover seisin of the land which is ancient demesne, but only that he be restored to his action, &c. which will be adjudged in the lord's court, according to their custom, which is, that such fine is a sufficient bar to the tail. D. 373. pl. 13. Mich. 22 & 23 Eliz. Anon. and nothing more done.

(P) Disceit. *Who shall have it.*

[ 497 ]

[ 1. **I**F a fine be levied at the common law of land in ancient demesne, the lord may avoid it by a writ of disceit. 1 Ed. 3. 5. 26. b.]

Fol. 327.

[ 2. A termor may have this writ, and make it ancient demesne again, at least during his time. 1 Ed. 3. 5. 26. b.]

3. The king may have a writ of disceit, Br. Ancient Demesne, pl. 15. cites 11 H. 4. 85.

(P. 2) Disceit. Against whom it lies.

1. **W**HERE a fine is levied of lands in ancient demesne, by which fine divers remainders are intailed, it suffices to bring writ of disceit to annul this fine against the tenant of the land only, without naming those in remainder. Thel. Dig. 48. lib. 5. cap. 17. f. 2. cites Trin. 26 E. 3. 65.

2. Disceit lies against the conusee himself as well as against the conusor, because he is equally party to the fine, and it is the fine that works a prejudice to the lord. 1 Salk. 210. pl. 1. Mich. 9 W. 3. C. B. Zouch v. Thompson.

Ld. Raym. Rep. 177. S. C. — 3 Salk. 35. S. C. re-

solved accordingly.

3. This writ lies against the heir of the conusee or conusor; for this is a real disceit, and not like a personal wrong which dies with the person; for by this the lord is disinherited and debarred of the perquisites arising from his court, which is a permanent injury in the realty, and by no means dies with the person of him that did it, 1 Salk. 210. pl. 1. Mich. 9 W. 3. C. B. Zouch v. Thompson.

Ld. Raym. Rep. 177. S. C. & S. P. adjudged accordingly. — S. C. cited accordingly, Lutw. 713. and says it

was objected that the baron and feme were joint conusors, and therefore the writ being brought only against the heir of the baron was ill, and that it should have been against the heir of the feme only. Sed non allocatur, because the tertenant is the proper party to this action, and others, if necessary, may be brought in by sci. facias; and cites Fitzh. Fines 30. — 3 Salk. 35. S. C. accordingly. — 3 Lev. 419. Trin. 7 W. 3. C. B. the S. C. but S. P. does not appear.

( Q ) Disceit. *At what Time it lies.*

[ 1. **T**HE lord may have a writ of disceit *as well within the year after the fine levied as after.* 1 Ed. 3. 5. 26. b.]

2. It lies *after a fine levied, and the money paid to the king, though the fine be not ingrossed.* Agreed. Mo. 6. pl. 21. Hill. 3 E. 6. Anon.

And the five years non-claim is nothing

in this case; for a fine may establish the right of another, but cannot establish its own defects *ibid.* and *Ld. Raym. Rep.* 179. S. C.—3 Salk. 35. S. C. & S. P. resolved accordingly.

3. It lies *after 5 years after the fine levied, because the fine was Coram non judice, and merely void.* 1 Salk. 210. pl. 1. Mich. 9 W. 3. C. B. Zouch v. Thompson.

[ 498 ] ( R ) *What shall be reversed. What makes the Land Frank-fee.*

\* Fitzh. Disceit, pl. 37. cites S. C.

† Fitzh. Disceit, pl. 44. cites

[ 1. **I**F a fine be levied *in bank of land, of which parcel is at common law, and part ancient demesne, yet the fine shall be annulled for that which is ancient demesne.* 7 Hen. 4. 44. and shall stand for the residue. \* 17 Ed. 3. 31. b. † 21 Ed. 3. 20. b. adjudged.]

S. C. accordingly.—F. N. B. 98. (P) S. P. accordingly.—*Ibid.* in the new notes there (a) cites 7 H. 4. 44. 17 E. 3. 31. 21 E. 3. 20.—S. P. where in such case the lord reverses the fine by writ of disceit as to the lands, which are ancient demesne, it shall stand for the residue, and a mark shall be made upon the fine in nature of a cancelling of that which is ancient demesne, and the record shall stand for the remainder. Kelw. 43. in pl. 10. Pasch. 17 H. 7. by Vavisor.

See Le. 290. pl. 396. and 3 Le. 120. pl. 172. Lee v. Loveday. And see tit. Fines (E. b. 1) pl. 8. in the notes, and tit. Fine (L. b) pl. 8.

If there is any remainder limited by

the fine, the remainder-man shall be summoned to shew cause, if they can, why the fine should not be reversed. 21 Aff. 79. b. pl. 13.—S. P. Br. Disceit, pl. 21. cites 21 Aff. 13.

S. C. & S. P. cited as resolved accordingly,

Lutw. 713. Arg.—

1 Salk. 210. pl. 1. S. C.

but S. P. does not appear.—

3 Salk. 35.

S. C. but S. P. does not appear,—

3. A fine levied in C. B. of Lands in ancient demesne, was annulled on a writ of disceit brought by the lord. It was insisted that though it was reversed as to the lord, yet it may remain good as to the tenant; but it was adjudged by the court, that a fine may be reversed as to part of the land, and remain good as to the residue; but it can not be reversed in toto as to one man, and remain good in toto as to another, which must be in this case, if this fine remains good as to the tenant, and be reversed in toto as to the lord. *Ld. Raym. Rep.* 179, Hill. 8 & 9 W. 3. Zouch v. Thompson.

3 Lev. 419, S. C. but S. P. does not appear.

(S) *After*

(S) *After the Reversal of that which makes the Land Frank-fee, who shall have it.*

[ 1. ] **I**F a fine be reversed in disceit, the conusor shall have it again, because the fine was void; for that it was Coram non judice. Contra \* 7 H. 4. 44. † 7 Ed. 3. 31. b. Dubitatur ‡ 8 H. 4. 24.]

\* Br. Disceit, pl. 38. cites S. C. and says it was agreed that the

fine should be annulled against the lord; but quære if by this it shall be avoided between the parties.

† Fitzh. Disceit, pl. 37. cites S. C. says it was awarded to be reversed in toto, and that it was touched, that he who was in the land by such render shall maintain his possession upon reversal of the fine; for that it was good between the parties, and that this judgment of reversal shall aid him in his possession.

‡ Br. Fines, pl. 36. cites S. C.—Fitzh. Fines, pl. 30. cites S. C. and by Hull, the fine is void in toto.—4 Inst. 270. cap. 58. S. P. accordingly.

2. If a man levies a fine at common law unto another, of land which is in ancient demesne, the lord of ancient demesne shall have a writ of disceit against him, who levied the fine, and \* [him] who is tenant [and] shall avoid the fine, and there he who ought to give [gave] the land, shall be restored unto his possession and title which he gave by the fine, because the fine and gift thereby is avoided; but if he who levied the fine has, after the fine, *released unto him who hath the possession by the fine* by his deed, or confirmed his estate in the land by his deed, then it seems that he unto whom the release or confirmation is made shall have and keep the land, notwithstanding that the fine be avoided, because this release or confirmation made unto him being in possession, hath made his estate firm and rightful against him and his heirs who released or confirmed. F. N. B. 98. (A)

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10 Rep. 50. a. in Lampett's case, cites S. C. and says that this opinion was confirmed for good law per tot. cur. in the principal case; and yet after the fine levied the conusor had

not any right in the land, but only a possibility of having the land again, after the fine reversed by writ of disceit, to be brought by the lord of whom the land was held.—S. C. cited Arg. Lutw. 712.

N. B. This paragraph, as well as others in that most excellent work, are very badly translated; as are likewise great numbers of the books of reports; but this here is corrected according to the original French, which otherwise was not intelligible, or the sense perverted.

\* The English Translations are (he.)

(T) Declaration and Pleadings.

1. **I**N assise issue was taken that the land was frank-fee, and not ancient demesne, without any denial that the manor of which, &c. was ancient demesne. Br. Ancient Demesne, pl. 2. cites 9 Ass. 9.

Assise of tenements in B. The defendant pleaded that the

tenements are parcel of the manor of P. which is ancient demesne, &c. judgment of the writ. Finch. said it is frank-fee, *prist* by the assise; and by the opinion of the court it shall not be tried by the assise; for it is not denied but that the manor is ancient demesne. Br. Trials, pl. 120. cites 22 Ass. 45.—By which be said that those tenements were frank-fee time out of mind, without shewing how, &c. and yet the other was compelled to answer, and were put upon the country. Ibid.

2. None who refuse the franktenement in assise can plead ancient demesne,

demesne, and hence it seems that *none shall plead ancient demesne but the tenant of the frank-tenement*; per Herle. Br. Ancient Demesne, pl. 28. cites 9 Aff. 2.

And so note that in assise of rent ancient demesne of the land is a good plea; and see ancient demesne tried by assise, viz. per Patriam; and therefore not always by the

book of Domesday; and see that the tenant shall conclude judgment of the writ, and not judgment of the court will take consuance; quod mirum! Br. Ancient Demesne, pl. 29. cites 9 Aff. 9.

\* Br. Brief, pl. 265. cites S. C.

4. *None shall plead ancient demesne but he who is tenant, and not the disseisor.* Br. Ancient Demesne, pl. 31. cites 21 Aff. 2.

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5. *Assise by executors of tenant by elegit, the tenant said, that the land was parcel of the manor of B. which is ancient demesne, and the other said, that the tenements are and were frank-fee, and pleadable at common law, and the other awarded to answer to it, notwithstanding that it is not denied, but that it is parcel of the manor which is ancient demesne, and by common pretence this shall be as the manor is, by which others said that ancient demesne, prist, by assise, and if it be found that the land is ancient demesne, the writ shall abate, and the executors shall recover; for they cannot have writ of right upon the custom of the manor for the feebleness of their estate, but quære with protestation, &c.* Br. Ancient Demesne, pl. 33. cites 22 Aff. 45.

6. *He who alleges ancient demesne ought to bring in the record, and the court would not write for it, but gave day to the party at his peril, and he failed at the day, and the other party for his dispatch brought it in sub pede sigilli, which testified that it was frank-fee, &c.* Br. Ancient Demesne, pl. 23. cites 39 E. 3. 6.

The demandant cannot say that the land is not ancient demesne, for this is the conclusion upon the two prece-

7. *In præcipe quod reddat the tenant said, that the land was parcel of the manor of D. which is ancient demesne, and pleaded by petit writ of right, and demanded judgment if the court would take consuance; Kirton said it is frank-fee, and it was held that he should not have the averment, because he did not deny but that the manor is ancient demesne, and that this land is parcel, and therefore shall be intended to be of the same nature, by which the demandant passed over.* Br. Ancient Demesne, pl. 6. cites 41 E. 3. 22.

dent propositions, viz. 1st. that the manor is ancient demesne, and 2dly, that the land in demand is parcel of the manor, for this conclusion follows from the premisses, and therefore cannot be denied, per cur. 11 Rep. 10. b. cites S. C. and 48 E. 3. 11. a. b. — He ought to plead to the nature of the manor that it is not ancient demesne, or that the land in demand is not parcel of it. Le. 333. Arg. cites S. C. but misprinted, as 21 instead of 41 E. 3. 22.

8. *After ancient demesne pleaded the tenant cannot disclaim; for*

by the pleading ancient demesne he has accepted the tenancy, and therefore cannot disclaim after; Quære. Br. Ancient Demesne, pl. 6. cites 41 E. 3. 22.

9. In *assise* of land, the defendant said, that the land is held of the manor of B. and so parcel, which manor is ancient demesne, and pleads by petit writ of right-close; judgment if the court will take conuſance. Tank said, the *plaintiff* is lord of the manor, and the land in plaint is parcel of the demesnes of the manor, and in the hands of the tenants at will, and that the tenant at will inſcoffed the tenant, which is diſſeiſin to the plaintiff; judgment if the court ought not to take conuſance, and the assise awarded, and the ancient demesne no plea, inasmuch as that which is in the hands of the lord is frank-fee, and that which is in the hands of the tenant is ancient demesne. Br. Ancient Demesne, pl. 34. cites 41 Aff. 7.

10. *Monstraverunt* by three against one, and the defendant as to two of them said, that they were his villeins, judgment if they shall be answered, and to the third prayed that he ascertain the court if the manor be ancient demesne or not, and per cur. this ought to be done at the prayer of the defendant, though the tenant does not plead that it is frank-fee. Br. Ancient Demesne, pl. 9. cites 49 E. 3. 22.

11. *Assise* against several, the one defendant appeared and accepted the tenancy, and said, that the land is held of one E. as of his manor of D. which is ancient demesne, and pleadable by petit writ of right-close, judgment if the court will take conuſance; and the plaintiff said that the land is, and always was pleadable at common law, absque hoc that it was pleadable within the said manor, upon which the tenant demurred; quære of this pleading; for it seems that he ought to have said that the land is frank-fee, and not ancient demesne; but upon the matter the opinion of all the court was, that in as much as the plaintiff has not denied but that the manor of D. is ancient demesne, and that this land is held of the manor, but that it shall be taken ancient demesne, without special matter shewn to the contrary, as unity of possession in the lord, or fine levied at common law, or the like. Br. Ancient Demesne, pl. 2. cites 3 H. 6. 47.

12. Where rent is demanded which issues out of land in ancient demesne and land guildable, there ancient demesne shall not be pleaded, per Newton; and per Portington, if assise is brought where the lord of ancient demesne is named, there the ancient demesne is no plea. Br. Privilege, pl. 7. cites 20 H. 6. 37.

13. He who alleges ancient demesne shall say that the land is held of the manor, &c. which is ancient demesne, and pleadable by petit writ, &c. Br. Ancient Demesne, pl. 25. cites 36 H. 6. 18. per Prisot.

14. Tenant by receipt may, upon his receipt, plead that the land is ancient demesne where the tenant has affirmed it to be frank-fee by his render or confession of the action; Quod nota, per opinionem, &c. Br. Ancient Demesne, pl. 38. cites 2 E. 4. 26.

15. If the tenant in *præcipe quod reddat* says, that the land is parcel of the manor of B. which is ancient demesne, &c. the other shall not

In præcipe  
quod red-  
dat the co-

nant pleaded that the land in demand is parcel of the manor of D.

which is ancient demesne, and, &c. The plaintiff replied, that it is frank-fee. This is not good; for he denies the conclusion; but he ought to plead to the nature of the manor, that it is not ancient demesne, or that the land in demand is not parcel of it. Le. 333. pl. 467. Arg. cites 21 E. 3. 22.

*not say that the land is not ancient demesne, nor deny the manor to be ancient demesne, but he may say that the land in demand is not parcel, &c. or that the manor is frank-fee; for the land demanded shall be intended to be of the nature of the manor; per Finch. Br. Ancient Demesne, pl. 48.*

16. In *præcipe* quod reddat it is a good plea to say that the land is ancient demesne without traversing that it is frank-fee, because the writ is only supposal. Br. Traverse per, &c. pl. 185. cites 5 H. 7. 11. 12.

17. An abbot sued a writ of right-close in ancient demesne, and made his protestation to sue in nature of a writ of right at common law; the tenant joined the mise upon the mere right, and after sued an *Accedas ad curiam* to the sheriff of W. to remove the record. The question was, if this was sufficient cause of removal? Afterwards a procedendo was awarded directed to the bailiffs. D. 111. pl. 47. Hill. 1 & 2 P. & M. Sir Humphry Stafford's case.

Mo. 13. pl. 49. Hill. 4 & 5 P. & M. S. C.

18. Writ of disceit shall not abate by death of the conussee, for this action is but trespass in its nature for to punish this disceit, and no land is to be recovered, but only the fine reversed. 3 Le. 3. pl. 8. 4 & 5 P. & M. the King v. Dewe.

19. In disceit for levying a fine of a messuage, being ancient demesne, an exception was taken to the declaration that it was *de antiquo dominico dominæ reginæ Angliæ*, whereas it ought to have been *de antiquo dominico dominæ reginæ coronæ suæ*, &c. The opinion of the court was, that it was good both ways. 3 Le. 117. 118. pl. 166. Mich. 27 Eliz. C. B. Griffith v. Agard.

Without defence it may be refused, but is made good by acceptance.

1 Salk. 217. Pasch. 4 W. & M. in B. R. Ferrer v. Miller. — Show. 386. Farrers v. Miller, S. C. adjudged for the defendant. — 3 Lev. 405. Mich. 6 W. & M. in C. B. SMITH v. FRAMPTON, such plea was pleaded without defence, and no notice was taken of the want thereof.

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Comb. 186. Baker v. Winch, S. C. accordingly. — 12 Mod. 13. Parker v. Winch, S. C. accordingly. And by Holt Ch. J. the laying it in the declaration to be part of the manor, shews it not impleadable in the court of the manor.

21. In *ejectment* the defendant pleaded in abatement, that the lands were parcel of the manor of Bray, which manor was ancient demesne held of the crown; but held naught per tot. cur. For if the manor be ancient demesne, and the lands in question are part of the demesnes, as it must be understood they are, then they are impleadable at the common law, and not in the lord's court; but lands held of the manor are impleadable in the manor court, and there only; and because he did not plead that the lands were held of the manor of Bray, judgment was Quod respondeat ouster. 1 Salk. 56. pl. 1. Mich. 3 W. & M. in B. R. Barker v. Wich.

Comb. 183. Heydon v. Pace, S. C. and per cur.

22. In *ejectment* the defendant pleaded that the lands are parcel of such a manor, which is ancient demesne. The plaintiff replies that the tenements are pleadable at the common law, *absque hoc* that



that they are *parcel de antiquo dominico*. Upon a demurrer the defendant had judgment; for per cur. the traverse was ill; for he ought to have traversed that the manor was ancient demesne, and that shall be tried by Domesday book; or else to have traversed that those tenements were held of that manor. Show. 271. Trin. 3 W. & M. Hopkins v. Pace.

if he had traversed that they were parcel of the manor, it had been naught; for

they might be frank-fee, though held of a manor in ancient demesne; and they held the plea good, and judgment for the defendant.

23. In writ of *disceit* to reverse a fine levied in C. B. of lands in ancient demesne, the lord need not *shew his estate*; for if he was dominus pro tempore, it is enough; and if his estate be since determined, it must be shewn on the other side. 1 Salk. 210. pl. 1. Mich. 9 W. 3. C. B. Zouch v. Thompson.

Ld. Raym. Rep. 177, 179. S. C. and the saying that he was dominus, &c. &

adhuc est, is well enough. But upon this point it was adjourned to be argued again; and after argument it was adjudged that the fine be annulled. — 3 Salk. 35. S. C. & S. P. accordingly. — S. C. cited Arg. Lutw. 713. and that it was held that tenant for years, tenant for life, &c. are domini pro tempore; but if it was necessary to shew the estate, the words Ad Exheredationem are sufficient.

24. If you plead that the manor of D. is ancient demesne, you ought to aver it by the record of Domesday; for that is the trial of it; but if you plead that such a place is parcel of a manor, which is ancient demesne, then you ought to conclude to the country; for parcel or not parcel is triable per pais, cites 2 E. 3. 15. b. Thomas de Grenham's case. \* But it seems that the other side may traverse its being ancient demesne; and so was done between \* Saunders and Welch, Pasch. 9 Jac. C. B. Rot. 3165. Per Holt Ch. J. And a respondeas ouster was awarded. 1 Salk. 57. pl. 2. Hill. 12 W. 3. B. R. Hunt v. Burn.

\* See (A. 2) pl. 46

25. In *replevin*, &c. the defendant made cognizance, &c. and justified the taking for toll in H. market. The plaintiff replied that she is tenant of the manor of H. which is ancient demesne, and that the tenants of ancient demesne lands are quit of toll in all places, &c. Upon demurrer it was objected that the plaintiff had not well intitled herself to this privilege, because she only sets forth that she is tenant of the said manor, &c. whereas she should have said that she is seised in fee of such lands, &c. which she held of T. F. as of his manor of H. which is ancient demesne; but per cur. it is not necessary for such tenants to mention what estates they have; but it is sufficient to allege that homines & tenentes de antiquo dominico ought to be discharged of toll, &c. Then it was objected that the privilege was laid too general; for it was to be discharged of toll in all places, &c. when by law they are not discharged of toll, but only of such things which arise on their own lands, and which are for the support and ease of their families. But per cur. to be quit of toll in all places shall be intended of such things in all places where he is tenant. 3 Salk. 36. Savery v. Smith.

2 Lutw. 1144. Mich. 2 Jac. 2. S. C. and judgment for the plaintiff.

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26. The demesne lands and the manor itself, which is ancient demesne, is pleadable at the common law; as a man ought to sue his action for the manor, and for the lands, which are parcel of the manor, at the common law and in C. B. But if a man will sue for the lands which are holden of the manor, which are in the hands of a

*free tenant who holdeth of the manor*, he ought to sue for these lands his writ of droit-close, directed unto the lord of the manor, and there he shall make his protestation to sue in that court the same writ, in the nature of what writ he will declare. F. N. B. 11. (M).

27. In ejectment the defendant pleaded *ancient demesne*. It was moved to set aside the plea, because there was *no affidavit to verify it*, whereas the statute for amendment of the law says, that no dilatory plea shall be allowed without it. But per cur. *This is no dilatory, but only a plea to the jurisdiction*, and so an affidavit not necessary. Barnard. Rep. in B. R. 7. Mich. 13 Geo. 1. Goodtitle v. Rogers.

For more of Ancient Demesne in general, see *Fines*, (H. b. 3) (H. b. 4) (N. b. 4) *Trial*, and other proper Titles.

## Anglice.

It was moved to arrest judgment for a defect in the award of the venire, which was in *English*, and followed the old Latin form, (12 and so forth) for duodecim, &c. and so on. Upon shewing cause the court were of opinion that the venire was well awarded, the intent of the parliament being to translate no more into English than was before in Latin: but being told the same question was depending in the court of B. R. the court enlarged the rule till next term. Barnes's Notes in C. B. 158, 159. Hill. 6 Geo. 2. Fray v. Smith.

1. 4 Geo. 2. cap. 20. §. 1.

*ALL writs, process, pleadings, rules, indictments, records, and all proceedings in any courts of justice within England, and the court of Exchequer in Scotland, shall be in the English tongue.*

and so on. Upon shewing cause the court were of opinion that the venire was well awarded, the intent of the parliament being to translate no more into English than was before in Latin: but being told the same question was depending in the court of B. R. the court enlarged the rule till next term. Barnes's Notes in C. B. 158, 159. Hill. 6 Geo. 2. Fray v. Smith.

In action of *debt upon a bond*, the *alias dict'* was in the declaration put in *Latin*, as in the bond. It was moved in arrest of judgment, upon the late act of parliament, that all proceedings at law should be in English, and obtained a rule nisi. Afterwards on shewing cause, the court were of opinion that the *alias dict'*, if set out at all, must be set out in the same language as in the deed, and would otherwise be erroneous, and discharged the rule. Barnes's Notes in C. B. 160. Trin. 6 & 7 Geo. 2. Church v. Jason.—Rep. of Pract. in C. B. 91. S. C. and the declaration was held good.

For more of Anglice in general, see *Abatement*, *Amendment*, and other proper Titles.

• Annuity.

## • Annuity.

(A) What Things may make it. What not. [In respect of the Time when payable.]

• Annuity is a yearly payment of a certain sum of money granted to another  
Fol. 226.

[ 1. ] IF a parson grants to me 10l. every year, that I shall be resident within his parish, payable, &c. an annuity lies for this; for this is annual at my will. 7 H. 6. 19. b.]

in fee for life, or years, charging the person only of the grantor. Co. Litt. 144. b. (b)

[ 2. So if a man grants 20s. to me every Easter-day that you [I] stay with him in his house, if he [I] come at any day he [I] shall have annuity for this, yet at the grant it was uncertain whether he [I] would ever come there. 8 H. 6. 7.]

[ 3. If a man grants to me a rent of 20l. payable at the end of every 20 years, although this be not annual, yet an annuity lies for it. 8 H. 6. 6. b.]

An abbot, with the assent of his con-

vent, granted to a man and his heirs to find one of his monks to say mass, &c. every holy-day in such a chapel, and that as often as he should fail therein that they would forfeit to him and his heirs 5l. It seemed to the court, that in this case annuity did not lie for the heir, because it was not annual; and yet perhaps one may have writ of annuity for rent granted every 2d or 3d year. But Shelly said, that in this case the heir shall have no other action than debt. D. 24. pl. 149. Mich. 28 H. 8. Anon.

(A. 2) The Difference betwixt Annuity and Rent-  
Charge, or other Rents.

1. IF a man holds certain land by rent-service, and pays the rent to his lord continually in another county than where the land is, this shall change the nature of the rent, and therefore where the plaintiff would have intitled himself to it as to annuity, he was not suffered. Br. Rent, pl. 26. cites 36 H. 6. 13.

For if a man holds land in one county by castle-guard in another county, or to

do other foreign services in another, yet this is good, and shall be rent-service as above; for otherwise the tenant may be doubly charged, as it seems, viz. with annuity, and with rent-charge. Ibid.

2. A man in replevin prescribed, that the plaintiff and his ancestors, and those whose estate, &c. have had common in his land where, &c. and that the plaintiff and his ancestors have used to pay 10s. rent per annum to him and his ancestors for the same common, and so avowed for the 10s. and good, notwithstanding that he does not prescribe that he and his ancestors, &c. have had the rent, but that the other has paid it, and all is one, per cur. Quod nota. and this is not rent but annuity, for he cannot have assise; for he cannot have rent out of his own land; and yet a good prescription, per cur. but he ought to allege seisin, per cur. and so see prescription to distrain in his own land. Br. Prescription, pl. 1. cites 26 H. 8. 5.

P p 2

3. If

The reason is, because the person is not expressly charged by such a grant, but by operation of law. But proviso not to charge

the land is repugnant, per Popham Ch. J. Poph. 87. Hill. 37 Eliz. in case of Fulwood v. Ward.

3. If a man would that another should have a rent-charge issuing out of his land, but would not that his person be charged in any manner by a writ of annuity, then he may limit such a clause in the end of his deed, provided always that this present writing, nor any thing herein specified, shall any way extend to charge my person by a writ or an action of annuity, but only to charge my lands and tenements with the yearly rent afore said, &c. then the land is charged, and the person of the grantor discharged. Co. Litt. f. 220.

## (B) By what Words it may be granted.

Fitzh. Annuity, pl. 16. cites S. C. [ 1. ] If a man grants an annuity to another and his heirs, and does not say for him and his heirs, this is determinable by the death of the grantor. 2 H. 4. 13. Curia.]

S. P. and in such case annuity lies not against the heir of the grantor, though he has assets. Co. Litt. 144. b.

A man ought to grant an annuity for him and his heirs, otherwise the heir shall not be charged, nor can it continue after his death. Contrary of the grant of a rent out of land, or a grant of rent whereof he is seised; note a diversity; for this charges the land, but an annuity charges the person only. Br. Charge, pl. 54. cites 21 H. 7. 1. per Butler.

Where a man grants an annuity to J. S. and his heirs, this shall not serve but during the life of the grantor, and yet there it is fee-simple determinable upon the life of a man. Br. Estates, pl. 65. cites 21 H. 7. 4.

But if he had granted it for him and his heirs to the other and his heirs, it is otherwise. But of grant of rent out of land to J. S. and his heirs, it is good, for the land is charged, and in the other case the person is charged, which cannot extend to the heir without express words. Br. Ibid.

Co. Litt. 144. b. (d) [ 2. So if a man grants a rent in fee, without saying for him and his heirs, his heirs cannot be charged in an annuity. D. 18 El.]

S. P. D. 344. b. pl. 2. Mich. 17 & 18 Eliz. S. C. — 10 Rep. 128. a. cites S. C. accordingly; for the time of election to make it an annuity is past by the death of the grantor. — S. C. cited Hob. 58. — Br. Estates, pl. 65. cites 21 H. 7. 4. S. P. accordingly.

Fitzh. Annuity, pl. 16. cites S. C. accordingly. [ 3. The same law, though he adds further to the grant, that he obliges himself and his heirs to warrant the annuity to the grantee and his heirs, for this does not enlarge the grant. 2 H. 4. 13. Curia.]

Annuity, pl. 13. cites S. C. & S. P. by Hanke. and the court agreed to his opinion; but Brooke says, Quære of this opinion, because it seems it is good law in a covenant, annuity, obligation or warranty, but not in a grant of rent out of land, ut videtur. — S. P. per cur. Pl. C. 457. 2. — But if an abbot with consent of the covent by deed with their common seal grants an annuity to another in fee, and does not say that he grants it for him and his successors, and the abbot dies, and a new successor is elected, he shall be charged with the annuity, because the abbot with consent of the covent charges the whole corporation which continues for ever, and for that reason the annuity shall continue.

4. Affise of 20s. rent, the deed was, *I have granted to B. & hæredibus suis annum redditum 20s. de molendino meo de C. percipiend' de me & hæredibus meis in perpetuum*, and it was awarded that it was issuing out of the mill, and is only an annuity, and therefore the affise lies well. Br. Affise, pl. 247. (246) cites 22 Aff. 66.

5. Annuity was granted *solvend* at such and such feasts *si petatur*. It was a question if it be due without an actual demand. 2 Roll Rep. 264. S. C. adjournatur, Palm. 320. Mich. 20 Jac. B. R. Sir William Sands v. Lea. and ibid. 267. Sands v. Leake S. C. the court divided.

\* 6. An annuity which charges the grantor, though it be *with clause of distress*, not being granted for himself and his heirs *till election made and a distress taken*, is merely personal, per tot. cur. Cro. C. 171. pl. 17. Mich. 5 Car. B. R. in case of Bodvill v. Bodvill.

(C) Upon what Grant or Conveyance it lies.

[ 1. **UPON** a rent created by way of reservation no annuity lies. 1 H. 4. 4.] Co. Litt. 144. 2 S. P.

[ 2. [As] if a man makes a *feoffment in fee*, reserving a rent, no annuity lies for this, because the reservation are the words of the feoffor, and no grant of the feoffee. Co. Litt. 144.]

[ 3. [So] if a man before *Quia emptores* had made a feoffment, reserving a rent-service, no annuity lay for this rent-service. \* 33 H. 6. 34. b. admitted. † 36 H. 6. 13. b. 14. admitted. 33 E. 3. Annuity 52.] \* Fitzh. Annuity, pl. 8. cites S. C. but Br. Annuity, pl.

31. is neither S. C. nor S. P. nor do I find it in Br. Annuity, so that it seems to be misprinted in 1 D. 483. (C) pl. 3. (c). † Fitzh. Annuity, pl. 10. cites S. C. and Br. Rent, pl. 26 cites S. C. but S. P. does not clearly appear there.

[ 4. [But] if a man before *Quia emptores terrarum* had infeoffed another, rendering 20 marks rent, and the feoffee by another deed had obliged himself in 20 marks, to pay yearly to the feoffor, (as it seems to be intended) for certain lands which he had of his feoffment; upon this deed the feoffor might have an annuity, for this had no reference to the rent reserved upon the feoffment, but was a good grant, though no feoffment was made. 33 E. 3. Annuity, 52. adjudged.]

[ 5. If an annuity be granted by an abbot, prior, or parson, by the ordinance of the ordinary upon a certain accord, a writ of annuity lies for this. 25 E. 3. 39.] Fitzh. Aid, pl. 7. cites S. C. and S. P. seems admitted.—S. P. if the parson had *Quid pro quo*, though the ordinance made by the ordinary was without the consent of the patron. F. N. B. 152. (G)——Co. Litt. 343. b. 344. 2. S. P. accordingly.

[ 6. So if it be granted by the ordinary with the assent of the parson and patron. 8 R. 2. Annuity 53.] F. N. B. 152. (G) S. P. accordingly.

[ 7. If a man holds of me by a certain rent-service, and grants by a deed to me, reciting that the same land is held of me by the same rent, and for the greater surety he binds other lands to my distress, that I may distrain in other lands, I cannot have a writ of annuity upon this, because the condition of the rent is not changed by this deed. 33 E. 3. Annuity 52. but quære.] Fol. 227.

[ 8. If a rent be granted for equality of partition, no writ of annuity S. P. agreed by all the

justices and barons at Serjeant's Inn. Poph. 87. Hill. 37 Eliz.—For a rent granted for allowance of dower or recompense of a tithe, an annuity does not lie, because it is *in satisfaction of a thing real*, and therefore shall not fail to a matter personal, but always remains of the same nature as the thing for which it is given. Poph. 87. Hill. 37 Eliz. agreed by all the justices and barons at Serjeant's Inn.

[ 507 ] 9. Of such a rent as may be granted without deed, a writ of annuity does not lie, though it be granted by deed. Co. Litt. 145 in principio.

10. A rent-charge was granted out of a rectory by the parson, who afterwards resigned the parsonage. A writ of annuity lies against the grantor upon the same grant. Poph. 87. Hill. 37 Eliz. in the case of Fulwood v. Ward, cited by Clark, as reported by Bendlows to have been agreed in C. B. and agreed by several in the principal case to be law,

### (D) Upon what Title it lies.

\* This is misprinted, and should be 102. a. (c)—— F. N. B. [ 1. A Writ of annuity does not lie by prescription against an heir, because it cannot be known whether he has any land by descent from the same ancestor who first granted this. Co. Litt. \* 202.]

152. (F) S. P. and for the same reason.—Br. Annuity, pl. 45. cites F. N. B. 152. S. P. accordingly, and for the same reason.—Br. Annuity, pl. 10. cites 49 E. 3. 5. S. P. accordingly; though otherwise it is of annuity by deed, where assets descend to the heir; per Belk.—Br. Descent, pl. 53. cites F. N. B. the S. P. accordingly.—Fitzh. Annuity, pl. 13. cites Trin. 10 E. 4. 10. S. P. by Dauby accordingly.—S. P. admitted Arg. Mod. 200. in pl. 32.

2. A parson of a church may be charged in annuity by prescription; quod nota. Br. Annuity, pl. 10, cites 49 E. 3. 5.

3. Annuity may be prescribed in a corporation which is determined, and that this annuity was after granted over to another in fee. Br. Annuity, pl. 40. cites 22 E. 4. 43.

### (E) In what Cases a Grant of a Rent is void as a Rent, and yet shall be good as an Annuity.

The word to perceive out of, &c. is only a limitation where the party shall receive it. Br. Grants, pl. 4. cites S. C.—Br. An- [ 1. IF the queen grants a rent of 20l. to be received out of a certain sum assigned to her in part of her dower, de Magna Custuma London, by the hands of the collectors of the same custom, and the queen hath 1000l. of the custom assigned to her for part of her dower, yet because this cannot enure as a rent, because one rent cannot issue out of another, she may be charged in an annuity, because the grant was generally of 20l. de novo, not limited to the custom, but only the receipt limited to that, which cannot alter the grant. 9 H. 6. 12. adjudged.]

nuity, pl. 3. cites 9 H. 6. 12. 43. says the difference taken there is, where it is granted by the name of parcel of other rent, &c. and where it is granted to perceive of such a sum, &c. For in the



the one case, if he has no rent, the grant is void ; but in the other it is a good grant to charge the person by the word (perceive.)—Fitzh. Annuity, pl. 5. cites S. C. accordingly, and same diversity taken by Cotton and Marten.—Br. Grants, pl. 4. cites S. C. and same diversity accordingly.

[ 2. So in this case, if the queen had *not had any thing of the customs in dower.* 9 H. 6. 12.]

[ 3. So if a man hath a *rent of 100l. and grants an annuity of 10l. to be received of him who is to pay the rent to him, he is chargeable in an annuity.* 9 H. 6. 53.] [ 508 ]

cites S. C. & S. P. accordingly, by the better opinion, as Fitzherbert intends it.—Br. Annuity, pl. 3. cites S. C. Fitzh. Annuity, pl. 4.

[ 4. If a man grants an *annuity of 10l. out of his land in D.* and he *hath but 10l. rent there*, yet he is chargeable in an annuity. 9 H. 6. 53.] Fitzh. Annuity, pl. 4. cites S. C. & S. P. by

Newton, who held this to be a new annuity, and not a grant of the said rent.

[ 5. If a man grants a *rent of 20l. to be received of 40l. rent in D.* if he *hath no rent there*, yet this is a good annuity. 9 H. 6. 12. b. because this is a new rent.] Br. Annuity, pl. 3. cites S. C. & S. P. accordingly.

—Br. Grants, pl. 4. cites S. C. & S. P. accordingly.—Kelw. 161. b. 3 H. 8. S. P. per cur. and cited Trin. 9 H. 6. the opinion of Marten accordingly. pl. 1. Mich.

[ 6. So if a man grants a *rent of 20l. to be received of his tenants in D.* and he *hath no tenants there*, this is a good annuity. 9 H. 6. 12. b. 53. b.] Fitzh. Annuity, pl. 4. cites S. C. & S. P. by

Cotton.—Br. Annuity, pl. 4. cites S. C. but S. P. does not appear.

[ 7. So if a man grants a *rent out of his manor*, and he *has no manor*, yet this is a good annuity. 9 H. 6. 13. 53.] Br. Grants, pl. 4. cites S. C. & S. P.

accordingly.—If a man by his deed granteth a rent-charge out of the manor of Dale, (wherein the grantor hath nothing) with such *proviso that it shall not charge his person*, albeit the repugnancy doth not appear in the deed, yet the proviso takes away the whole effect of the grant, and therefore is in judgment of law repugnant ; for upon the matter it is but a grant of annuity, provided that it shall not charge his person. But if a man by his deed grants a *rent-charge out of land*, *provided that it shall not charge the land*, albeit the grantee hath a double remedy, (as has been said) yet the proviso is *repugnant*, because the land is expressly charged with the rent ; but the writ of annuity is but implied in the grant, and therefore that may be restrained without any repugnancy, and sufficient remedy left for the grantee ; for which cause our author puts his case of restraint of bringing a writ of annuity. Co. Litt. 146. a.

• S. P. accordingly by Popham Ch. J. Poph. 87. Hill. 37 Eliz.

[ 8. So if a rent be granted to be received *out of an acre of land in A.* and he *has not any acre there*, yet this is a good annuity. 9 H. 6. 12.] Br. Grants, pl. 4. cites S. C. but S. P. exactly

ly does not appear.—D. 344. b. Marg. pl. 2. cites like point, Hill. 42 Eliz. C. B.—Ow. 3. Pasch. 26 Eliz. says S. P. was agreed by the court.—Goldsb. 30. pl. 1. Mich. 29 Eliz. cites S. P. by Anderson, and agreed to by the court in Sellenger's case.

N. covenanted with the wife of the plaintiff dum sola by indenture, reciting that she was seised in fee of certain lands, and that in consideration of a marriage to be had between the plaintiff and her son, did grant to the plaintiff a *rent-charge* out of those lands, *to have after the death of her son, and covenanted to pay it, &c.* The defendant pleaded that she had nothing in the lands at the time of the grant, but that a stranger was seised thereof ; and upon demurrer it was adjudged for the plaintiff, both because the defendant is estopped by the deed, and that the covenant extends to it as an annuity. All. 79. Trin. 24 Car. B. R. Newton & Ux' v. Weeks & Ux.

[ 9. If a man grants an *annuity to be received out of a bag of money*, this is a good annuity. 9 H. 6. 12. b.]

[ 10. So if he grants an annuity to be received of *J. S. a stranger*, these

these words *to be received of J. S.* are void, and yet it is a good annuity; for the first words create the annuity. 9 H. 6. 53.]

S. C. cited  
per cur.  
Hutt. 33.  
—In

\* [ 11. So if a man grants an annuity to be received *out of his coffers*, the last words are void, and the annuity good. 9 H. 6. 53.]

Such case annuity lies. F. N. B. 152. (A)

Br. Grants,  
pl. 4. cites

\* Fol. 228.

S. C. &  
S. P. ac-  
cordingly,  
by Godred.

[ 12. If a man has 20s. rent-service of several tenants, and he reciting this rent grants an annuity of 10s. to receive of the tenants, (\*) this is void as a rent, because none of the tenants hold by 10s. but every one by 12d. and so it is not known who shall pay it, nor who shall attorn, and therefore it is a good annuity. 9 H. 6. 12. b.]

[ 13. If a man recites that he has 10l. rent of one A. and grants an annuity of 10s. percipere of the said rent, if he has no rent yet it is a good annuity. 9 H. 6. 13.]

\* This is  
fol. 161. b.  
pl. 1.

[ 14. [But] if a man recites, that whereas he has 20s. rent issuing out of the manor of D. and grants 10s. parcel of the said 20s. if he has no rent issuing out of the said manor, he is not chargeable in an annuity, but the grant is utterly void, for he intended to pass the rent he had there. Kell. 3 H. 8. \* 1.]

Kelw. 161.  
h. pl. 1.  
Mich. 3 H.  
8.

[ 15. So if the grantor had had such rent issuing out of the said manor, the person of the grantor could never have been charged upon such grant. Kell. 3 H. 8. 1.]

\* See the  
note, at pl.  
15.

[ 16. But if a man recites that he has 20s. rent issuing out of the manor of D. and grants 10s. issuing out of the said 20s. the grantee may, upon this grant, charge the person of the grantor by writ of annuity. Kell. 3 H. 8. \* 1.]

\* See the  
note at pl.  
15.

[ 17. So if a man recites, that whereas he has 10l. issuing out of the manor of D. and grants 40s. to another percipere of the said 10l. when in truth he has not any such rent, yet the grant is good to charge the person of the grantor, for the words (percipere of the said 10l.) are more than was necessary, because the grant was sufficient before. Kell. 3 H. 8. \* 1.]

Hob. 248.  
pl. 319. S.C.  
—Hutt. 33.  
S.C. adjudg-  
ed for the  
plaintiff.

[ 18. If a man grants an annuity to another solvend out of the clear gains of allom mines, in a writ of annuity it is no plea for the defendant to say that there were not any clear gains, for the grant charges the person, and the rest is idle. Hobart's Reports, case 317. between Smith and Boncher, adjudged. Trin. 17 Jac. B.]

\* This is  
misprinted,  
and should  
be 9 H. 6.  
a. b.

[ 19. If a man has 100l. de Magna Custuma London, and he grants 20l. of the 100l. it is void, and if it be not void, yet because the intent appears to pass only part of the 100l. and not to make a new grant of 20l. his person is not chargeable. \* 19 H. 6. 12. A. B. agrees.]

Fitzh. An-  
nuity, pl. 5.  
cites S. C.—  
Br. Grants,  
pl. 4. cites  
S. C.

[ 20. If a man has a rent of 20s. of one tenant, and he reciting this, grants 10s. of his rent, if the tenant attorns, this is a good grant of the rent, but if he does not attorn it is void, but whether he attorns or not, yet the person of the grantor is not chargeable in an annuity. 9 H. 6. 13. 53. 9 H. 6. 53. if the tenant attorns.]

[ 21. If

[ 21. If a man recites how he *has* 20*l.* rent, and grants 10*l.* of *the same* rent, if he has *no* rent his person shall not be charged, because he intended to pass what he had as a rent, and not to make a new rent. 9 H. 6. 12. 53.]

Br. Grants, pl. 4. cites S. C. & S. P. accordingly. —Fitzh.

Annuity, pl. 5. cites S. C. and S. P. accordingly, by Marten and Cotton.

[ 22. If a rent-charge is granted to A. for years, and after arrearages incur, and A. dies during the years, the executors of A. \* may not have a writ of annuity for the arrearages incurred in the life of the testator, because the annuity does yet continue. Mich. 22 † Jac. B. R. between Carew and Burgen upon a demurrer, per curiam.]

Baron and Feme (D.) pl. 8. S. C. But not S. P.—But if a man grants a rent-charge

out of certain lands to another for life with a proviso that it shall not charge his person, and the rent is behind, the grantee dieth; the executors of the grantee shall have an action of debt against the grantor, and charge his person for the arrearages in the life of the grantee, because the executors have no other remedy against the grantor for the arrearages, for distrain they cannot, because the estate in the rent is determined, and the proviso cannot leave the executors without remedy. Co. Litt. 146. b. — Pending writ of annuity the term expired, and it was the clear opinion of the whole court, that the plaintiff could not have judgment, which in this writ is *Quod querens recuperet annuitatem prædictam*, and now there is not any annuity in being. 2 Le. 51. pl. 68. Trin. 29 Eliz. B. R. Backhouse v. Spencer.

[\* Quære if this should not be (may have) leaving out the word (not) in the original, because it is said that the annuity is still continuing.] — But when an annuity determines, though it be pending a writ of annuity, the writ fails for ever, because no like action can be maintained for the arrearages only, but for the annuity and arrears. Co. Litt. 285.

† [510]

## (F) At what Time it lies.

[ 1. IF the grantee of a rent brings an assise for it, he shall never after have a writ of annuity, because by the bringing of an assise he has elected it to be a rent. 18 E. 3. 7. b.]

S. P. accordingly, if he makes his plaint;

but the purchasing a writ of annuity, and entry of it in court of record, or an assise, is no determination of the election, because a stranger may purchase a writ in the name of the grantee, and enter it of record; but his appearing determines his election. Co. Litt. 145. (a) (1)

2. Writ of annuity does not lie after the grant determined by judgment or otherwise; but Debt. F. N. B. 152. (C) in the new notes there (a) cites 16 E. 3. Annuity 22. 15 H. 7. 1.

3. If the annuity determines pending the writ, it abates. F. N. B. 152. (C) in the new notes there (a) cites 16 E. 3. Annuity 22.

4. When the rent is extinguished by his purchase of part of the land, he shall never have a writ of annuity, because it was by the grant a rent-charge, and he hath discharged the land of the rent-charge by his own act, by purchase of part; and therefore he cannot by writ of annuity discharge the land of the distress. Co. Litt. 148. a.

5. But if the rent-charge be determined by the act of God or the law, yet the grantee may have a writ of annuity; for *actus legis nulli facit injuriam*. Co. Litt. 148. a.

As if tenant for another man's life, by his deed

grants a rent-charge to one for 21 years, and *Cestuy que vie* dies, the rent-charge is determined, and yet the grantee may have, during the years, a writ of annuity for the arrearages incurred after the death of *Cestuy que vie*, because the rent-charge did determine by the act of God, and by the course of law, *actus legis nulli facit injuriam*. Co. Litt. 148. a.

\* 2 And. 2.  
in case of  
Fulwood  
v. Ward,  
S. C. cited,  
and *ibid* 4.  
denied.—  
S. C. cited,  
and denied to be law, in the S. C. of Fulwood v. Ward. Poph. 86.

6. The like law is, if the *land out of which* the rent-charge is granted be *recovered by an elder title*, and thereby the rent-charge is avoided, yet the grantee shall have a writ of annuity, for that the rent-charge is avoided by the course of law; and so it was holden in Ward's case, against an opinion obiter in \* 9 H. 6. 42. 2. Co. Litt. 148. a.

7. The plaintiff declared upon a *grant* of an annuity for term of years, and *pending the action the term expired*. The court held clearly that the plaintiff could not have judgment; for the judgment in this writ is *Quod querens recuperet annuitatem suam*, whereas now there is no annuity in being. 2 Le. 51. pl. 68. Trin. 29 Eliz. B. R. Backhouse v. Spencer.

Mo. 301.  
pl. 450.  
S. C. ad-  
judged ac-  
cordingly.  
—2 And. 1.  
pl. 1. S. C.  
adjudged  
according-  
ly.—S. C.  
cited 2 Rep.  
56. b. says  
that the  
act of God,  
viz. the  
death of P. by which the rent-charge was determined, was no determination of the annuity.

8. W. *lessee for years, determinable on the life of P.* by writing granted an annuity of 10l. a year out of the premises for 15 years, with clause of distress. P. died in 3 years. The grantee brought writ of annuity in C. B. for the arrearages after his death, and the case for difficulty was argued at Serjeant's-inn before all the justices and barons, and they all, except Walmley, Fenner and Owen, agreed that the plaintiff ought to have judgment; for the law gives him an election at the beginning to have it a rent or an annuity, which shall not be taken from him but by his own act or folly; and judgment in C. B. accordingly. Poph. 86. pl. 2. Hill. 37 Eliz. B. R. Fulwood v. Ward.

## (F. 2) In what Cases the Grantee has Election to make it a Rent or Annuity.

1. **I**F the grantee brings an *assise* for the rent, and *makes his* *plaint*, he shall never after bring a writ of annuity. Co. Litt. 145.

2. An *avowry in court of record*, which is in nature of an action is a determination of his election before any judgment given. Co. Litt. 145. b.

3. If a rent-charge be granted to A. and B. and their heirs, and A. *distraints* the beasts of the grantor, and he sues a replevin, A. *avows for himself*, and *makes consuance for B.* A. dies, and B. survives. B. shall not have a writ of annuity; for in that case the election and avowry for the rent of A. bars B. of any election to make it an annuity, albeit he assented not to the avowry. Co. Litt. 146.

4. The grantee hath election to bring a writ of annuity, and charge the person only to make it personal, or to distrain upon the land, and to make it real. Co. Litt. 144. b.

5. Of such a *rent as may be granted without deed*, a writ of annuity does not lie, though it be granted by deed. Co. Litt. 145. a. at the top.

6. If

6. If grantee of a rent-charge *takes lease* of the land *for 2 years*, he shall never after the 2 years ended have election to make this an annuity. D. 140. a. pl. 40. Marg. cites Mich. 43 & 44 Eliz. per Walmesley J.

7. *Purchase of the land* by the grantee of the rent-charge *before election made* will discharge the land. D. 140. pl. 40. cites Litt. Where a grantee purchases  
*parcel of the land charged*, he has excluded himself of his election by his own act; by the Ch. Justice and Ch. Baron, and several other justices and barons at Serjeant's Inn. Poph. 86. Hill. 37 Eliz. in case of Fulwood v. Ward.

8. *Release of all annuities before election made*, will discharge the land also. D. 140. pl. 40. Hill. 3 & 4 P. & M.

9. A. grants a rent-charge to B. which is paid to him, and then B. grants it over to C. and the tenant of the land *attorns*; now C. shall not have election to make this an annuity, but ought to take it as a rent-charge. Goldsb. 83. pl. 1. Pasch. 30 Eliz. Anon.

10. If a *termor for 2 years* grants a rent-charge *in fee*, this, as to the land, is but a rent-charge for 2 years, and if he *avows upon it on the determination of the term*, the rent is gone; but by way of annuity it remains for ever, if it be granted for him and his heirs, and assets descend from the grantor; per Popham Ch. J. Poph. 87. Hill. 37 Eliz. B. R. in case of Fulwood v. Ward. [ 512 ]

11. Neither the presumption of law, nor the *express grant as a rent*, shall take away from the grantee the benefit of his election, where no default was in him; but that upon his election he may make it to be otherwise, as *ab initio*; per omnes J. And per Popham Ch. J. therefore if a *rent-charge be granted in tail*, the grantee may bring a writ of annuity, and thereby prejudice his issue, because then it shall not be taken to be an intail, but as a *fee-simple conditional ab initio*. Poph. 87. Hill. 37 Eliz. B. R. Fulwood v. Ward.

## (F. 3) What shall determine Grantee's Power of ~~See (F. 2)~~, Election to make it a Rent or Annuity.

1. **I**F a man has *annuity with clause of distress*, and *he distrains*, yet he may have writ of annuity after if he has not avowed in court of record. Br. Annuity, pl. 36. cites 10 E. 4. 10. per Choke.

2. If a man *grants a rent-charge to a man and his heirs*, and dies, and his *wife brings a writ of dower* against the heir, and the *heir, in bar of her dower, claims the same to be an annuity, and no rent-charge*, yet the wife shall recover her dower, for he cannot determine his election by claim, but by suing of a writ of annuity, neither can the heir have, after the endowment, an annuity for the two parts, for that should not be according to the deed of grant, for either *the whole must be a rent-charge or the whole an annuity*. Co. Litt. 144. b.

3. This determination of the election of the grantee must be *by action*

*action or suit in court of record*, for albeit the grantee distrains, yet he may bring a writ of annuity and discharge the land. Co. Litt. 145.

4. If the *grantee* brings a writ of annuity, and at the return thereof *appears and counts*, this is a determination of an election in court of record, albeit he proceeds no further. Co. Litt. 145.

5. The *purchasing of a writ of annuity*, and entry of it in court of record, or of an assise, is no determination of the election, because a stranger may purchase a writ in the name of the grantee, and enter it of record; but *if the grantee appear* thereunto, &c. then this amounts to a determination of his election, as has been said. Co. Litt. 145.

6. Where the *rent-charge* is *apportioned by act in law*, the writ of annuity fails; for if the grantee should bring a writ of annuity, he must ground it upon the grant by deed, and then he must bring it for the whole. Co. Litt. 150. a.

Fin. in the folio edition, 17. b. cites S. C. and in the 8vo. edition, 68. says, that the grantee had judgment to recover in the writ of annuity, and yet shall dis-  
train afterwards, but

7. A man granted a rent-charge by deed out of his lands, without saying *Pro se & hæredibus suis*, and died. The grantee brought annuity and counted upon the deed, and the heir appeared and imparled to the next term. The plaintiff discontinued his suit, and distrained for the rent. The heir pleaded the matter above. But upon demurrer the whole court held the distress good and lawful, because the person of the heir was not bound nor charged by any word in the deed, and consequently no election remained in the grantee after the grantor's death to make it annuity or rent-charge; so that though the process in the writ of annuity had proceeded to judgment, (as Littleton speaks) \* yet this would not discharge the land in this case. D. 344. b. pl. 2. Mich. 17 & 18 Eliz. Anon.

this is not exactly agreeable to the original in D. which is as above.——Co. Litt. 145. a. cites Litt. f. 219. where he says, that if the grantee recovers by writ of annuity, then the land is discharged of the distress, which Ld. Coke observes, is putting the case very surely upon a recovery in a writ of annuity; but if the grantee brings annuity, and at the return thereof appears and counts, this is a determination of his election in court of record, albeit he never proceeds any further.——And per Popham, Poph. 87. S. P. and the heir shall never be charged, yet if the grantee had taken it as a rent-charge the land had been charged with it in perpetuity.

One that had nothing granted a rent-charge, for which he avowed in replevin, yet it was agreed that he might bring annuity, because there was no election. D. 344. b. Marg. pl. 2. cites Hill. 42. C. B. Anon.

\* [ 513 ] 8. If *feoffee on condition* grants a rent-charge, and presently breaks the condition, whereupon the *feoffor* re-enters, the *feoffee* shall be charged by writ of annuity; for it would be against all reason that he by his own act, without any folly of the grantee, shall exclude the grantee of his election which the law gives at the beginning; by the Ch. Justices and Ch. B. and other justices and barons. Poph. 86. Hill. 37 Eliz. at Serjeant's Inn, in case of Fulwood v. Ward.

9. If a *disseisor* grants a rent-charge to the *disseisee* out of the land which he had by the disseisin, if the *disseisee* re-enters before a writ of annuity brought, the annuity is gone; for this was his own act. By the Ch. Justices and Ch. B. and other justices and barons



at Serjeant's Inn. Poph. 86, 87. Hill. 37 Eliz. in case of Fulwood v. Ward.

(F. 4) Charged. How. Jointly or severally.

1. **I**F the grant be *Obligamus nos & utrumque nostrum*, the grantee may have a writ of annuity against either of them, but he shall have but one satisfaction. Co. Litt. 144. b.
2. Grant by two of 20l. per ann. to A. though the persons are several, yet A. shall have but one writ of annuity. Co. Litt. 144. b.
3. If A. be seised of lands in fee, and he and B. grant a rent-charge to one in fee, this prima facie is the grant of A. and the confirmation of B. but yet the grantee may have a writ of annuity against both. Co. Litt. 144. b.
4. A. and B. jointenants of land in fee, by their deed grant a rent-charge out of those lands, provided that the grantee shall not charge the person of A.; in this case, if the grantee bring a writ of annuity he must charge the person of B. only. Co. Litt. 146. b.

(F. 5) What shall determine or suspend an Annuity.

1. **I**N assise annuity of 10 marks was granted till the grantee was advanced to a competent benefice, and they were at issue of the value of the benefice tendered and refused, viz. that it is not worth 10l. &c. and the other e contra where the annuity was of 10 marks; and it was said, that if he had accepted the benefice it had extinguished the annuity of \* whatever value the benefice had been; the reason seems to be because the acceptance proves that the grantee took it as competent. Br. Annuity, pl. 30. cites 10 Ass. 4.  
If A. (always man) has the nomination to a benefice, and B. the presentation, and B. grants an annuity to C. a clerk, until he be advanced to a benefice by B. if afterward the church become void, and C. is nominated to B. to be presented over, and A. does so accordingly, and upon this B. is admitted, instituted, and inducted, yet the annuity shall not cease, for that the grantee was not thereunto preferred by the grantor, although he presented him. Dod. of Adv. 65, 66. Lect. 12.
2. A man granted annuity to J. N. *pro consilio impenso & impendendo*. He required counsel, and the other refused. The annuity is extinct; for it is a condition in law, &c. \* But he is not bound to counsel him but in a place where he finds J. N. but J. N. is not bound to go or ride to any place to give counsel; and if he promises him to come to B. to counsel him, and does not come, yet this is no bar in writ of annuity; for it is a bare promise. Br. Annuity, pl. 18. cites 21 E. 3. 7.—And such another case and judgment 8 H. 6. 23. Ibid.  
\* [ 514 ]  
 \* S. P. For he is not bound to travel; for a man may notify his case to him, and he may give his counsel where he is, without going to the party. But annuity granted for life *pro auxilio & consilio habendo*, and the defendant said that the plaintiff is a physician, and that the defendant was ill, and sent J. B. to him for his counsel and aid, and the plaintiff would not counsel nor aid him, judgment si actio, and the opinion is, that it is an extinguishment

guishment of the annuity; for a physician ought to go to the patient to counsel him; for the patient cannot come to him. Note a diversity. Br. Annuity, pl. 7. cites 41 E. 3. 6. 19.

3. But there it is agreed, that if the grantee grants by the same deed that he will go with him to such place, &c. then, if he does not, he shall forfeit the annuity; per Straunge. *Quære* inde; for it is a grant, and not a condition; but the words were *pro quia quidem concessione & donatione*, he granted to come to the place to counsel him, &c. Br. Annuity, pl. 18. cites 21 E. 3. 7.

4. Annuity by the prior of T. against the parson of D. The defendant said that H. was seised of the advowson, and granted it to W. predecessor of the plaintiff, and after he purchased the church in *proprior usus*, and held a good plea. The reason seems to be inasmuch as the appropriation made unity of possession, and so extinct. Br. Annuity, pl. 14. cites 2 H. 4. 16.

5. If an annuity be granted *pro homagio & servitio*, and the grantor disclaims in the services in writ of annuity, the annuity ceases; per Rickhil J. Br. Extinguishment, pl. 37. cites 7 H. 4. 16.

6. If I grant an annuity to J. S. to keep my park, and after the game is killed in his default; this is an extinguishment of the annuity. Br. Annuity, pl. 49. cites 5 E. 4. 5.

Br. Double  
Plea, pl.  
100. cites  
2 C.

7. Annuity granted so long as the grantee should be benevolens, proferens & amicus to the grantor; there, if the grantee labours to put the grantor out of service, where he has 4 marks-fee per ann. it is a forfeiture of the annuity. Br. Annuity, pl. 35. cites 7 E. 4. 16.

8. Where a vicarage is charged with an annuity, it shall not be suspended by the entry of him who has the annuity in the vicarage; for the glebe is not charged, but the person of the vicar. Br. Grants, pl. 56. cites 21 H. 7. 1.

9. If an annuity be granted *pro decimis*, &c. if the grantee be unjustly disturbed of the tithes, the annuity ceases; and so it is if annuity be granted *pro consilio*, and the grantee refuse to give counsel; the annuity ceases. Co. Litt. 204. a

Mo. 522.  
pt. 689.  
S. C. but  
S. P. does  
not appear.

10. A. granted annuity to be paid at A.'s house on request, at the four usual feasts in the year. If no request be made at any of the feasts, yet the annuity is not lost; for by the grant it is a duty, and the limitation to be paid at the 4 feasts is a limitation of the payment, and if it were not a duty the request is not material; per totu cur. Cro. E. 721. pt. 49. Mich. 41 & 42 Eliz. G. B. Thomson v. Butler.

## [ 515 ] (F. 6) In what Cases an Annuity may be granted over.

1. **I**N annuity the plaintiff counted that J. bishop of E. was seised of the annuity, and granted it to 2, and for the arrearages they counted, &c. Per Belk. This is only a personal action, which cannot

cannot be granted over no more than debt; but per Thorpe, annuity is inheritable, therefore it may be assigned over. Quære; for it was not admitted. Br. Annuity, pl. 8. cites 41 E. 3. 27.

2. In debt, where a man has *annuity to him and his heirs*, he may grant it for term of life, or otherwise; per Ascue, quod nemo negavit. Quod quære; for it is not in a manner, but a chose en action. Br. Annuity, pl. 19. cites 19 H. 6. 42.

3. If a man has an *annuity by general grant or by prescription*, he may grant it over, though it be in a manner a chose en action. Br. Annuity, pl. 37. cites 21 E. 4. 20. per Catesby J.

4. It was doubted whether he who has annuity *in fee* may grant it over; for it is a chose en action. But by others it is inheritance, and therefore may well be granted over, and this without attornment; for this charges the person, and yet the defendant was charged as parson of a church. Br. Annuity, pl. 39. cites 21 E. 4. 83.

5. An annuity was granted by the parson of B. pro consilio antea tunc impenso habend' & recipiend' to the said G. and his assigns. Debt was brought by the assignee of the grantee. All the justices held the grant good, and that debt lies by the assignee. Mo. 5. pl. 18. Trin. 3 E. 6. Baker v. Brooke.

Ibid. says, Nota it was pro consilio impenso, and not impendendo.

—D. 65. a.

pl. 1. S. C. says it was pro consilio impenso, and that it was much doubted, and argued at the bar, and that it was moved that it lay not for the grantee, because it appears by the count that the first grantee was seised thereof in his demesne as of franktenement, by which he made his election to take it as a rent-seck; for it was not granted out of the rectory of B. And the reporter says Quære here, because no judgment is entered on the roll. — Dal. 5. pl. 10. Anon. but is the S. C. though he states the grant to be pro bono consilio imposterum impendendo; but says (as likewise Mo. 5. 6. does) that the parties came to an agreement; but the court declared that they were agreed that the grant was good. — And D. 65. in Marg. says that Bendloe reports that the justices held the count good, and that their opinion was that the plaintiff ought to recover.

6. Annuity was granted by the parson of B. upon a grant of an annuity made by him of 40l. *pro bono consilio suo imposterum impenso* [impendendo] for the life of the grantor. The court agreed that this annuity might be granted over. Het. 80. 81. Hill. 3 Car. C. B. Gerrard v. Boden.

Annuity granted pro consilio impendendo, is not grantable over.

Br. An-

nuity, pl. 37. cites 21 E. 4. 20. per Catesby. — A man granted a rent out of certain lands *pro consilio impenso & impendendo*, to have and to hold to him and his assigns for term of his life, payable at four feasts in the year; and upon default of payment *upon demand*, it should be lawful for him to distrain. The grantee granted the rent over. The assignee, after one of the days, demanded the rent, and distrained, and the distress adjudged lawful. Co. Litt. 144. a.

## (F. 7) What Action must be brought for the Annuity or Arrears. [ 516 ]

1. [ If rent be granted out of land in two counties, assise does not lie, but writ of annuity. Br. Rents, pl. 22. cites 17 E. 2.

2. If annuity be granted to one for homage and services, and writ of annuity is brought, and the defendant disclaims in the services, the annuity shall cease imperpetuum, but of the arrears before the disclaimer the plaintiff shall have writ of debt, and no annuity, for the annuity

annuity is extinguished by the disclaimer. Br. Annuity, pl. 16. cites 7 H. 4. 16.

3. Where a plea goes to all, and to the extinguishment of the annuity, debt will lie of the arrearages before, and not writ of annuity. Br. Annuity, pl. 20. cites 19 H. 6. 54.

4. If a man grants an annuity, and after grants by another deed, that if it be arrear he may distrain in such lands, there he may distrain, and yet shall not have assise, for the annuity remains sicut prius. Br. Assise, pl. 489. cites 32 H. 6. 27. per Littleton.

Contra

now by the statute of 23 H. 8. 14.

Quod nota; by Brooke. Ibid.

5. In annuity the sheriff returned Nihil, and was compelled to amend his return, for no such process as capias did lie in annuity then. Br. Annuity, pl. 5. cites 33 H. 6. 43.

Br. Deux Plees, pl. 22. cites S. C.

6. Though annuity *pro consilio* be determined by refusal, yet debt lies of the arrears before, and this action is debt, but in action of annuity, there the refusal goes to all of this nature of action; nota difference in annuity, and e contra in debt upon arrears of annuity. Br. Annuity, pl. 28. cites 39 H. 6. 22.

7. If annuity be granted for life of J. N. and the grantee brings writ of annuity, and J. N. dies pending the writ, the action is determined, and the party shall have writ of debt of the arrears. Br. Annuity, pl. 22. cites 14 H. 7. 31. & 15 H. 7. 1. per Brian.

S. P. and so where it is granted *pur auter vie*. Br. Dette, pl. 203. cites S. C.

If a man has annuity for term of

years, he shall have writ of annuity as long as the annuity continues, and after this is ended he shall have debt of the arrears, per Vavisor, Davers, and Fineux. Br. Annuity, pl. 32. cites 9 H. 7. 16. — Br. Dette, pl. 144. cites 9 H. 7. 17. S. C. — Br. Annuity, pl. 29. cites 39 H. 6. 28. that annuity lies, and not debt, so long as the term continues. — S. C. cited by Williams J. Bullst. 152. Trin. 9 Jac. and held accordingly.

9. Where a man grants an annuity to J. S. during the life of the grantor, and the annuity is arrear, and the grantor dies, the grantee himself shall have action of debt of the arrears of the annuity, because the annuity is determined. Contra when the annuity continues, as it seems. Br. Dette, pl. 191. cites Vet. N. B.

And so action of debt lies of the annuity

when the annuity continues, and it shall be in the detinet where writ of annuity is in the debt. Br. Annuity, pl. 46. cites Old Nat. Brev.

[ 517 ]

11. An annuity was granted to a woman for life, who afterwards married, and arrears being due, she died, so that the annuity was determined. Adjudged that her husband might have an action of

of debt at common law; for an annuity is more than a Chosen action; for it may be granted over. Ow. 3. Pasch. 26 Eliz. Anon.

## (F. 8) Pleadings. Declaration.

1. *RENT* was granted to T. Quintin by his father by name of T. his son, and he brought assise of the rent by name of T. Q. of N. and did not say T. son of T. Q. and yet the writ good; quod nota; and yet in annuity it ought to agree with the specialty. Br. Variance, pl. 70. cites 26 Aff. 38.

2. Annuity against the parson of E. the plaintiff counted that he and his predecessors, time out of mind have been seised of the said annuity of 40s. per ann. by the hands of A. late vicar of E. and of his predecessors vicars time out of mind, and that king E. 3. when a vicar died, presented one J. as parson, who was instituted and inducted, and all his predecessors after him as parson, and also this defendant, and that he has been seised of the annuity by the hands of the said parsons till the defendant withdrew it, and the count awarded good; for he shall be taken now as parson, and not as vicar, so that the writ shall not be brought against him as vicar; quod nota per judicium; for it is agreed, that though there are vicars and parsons (as are in divers churches) and several patrons, yet when one is presented as parson he shall be taken as parson. Br. Annuity, pl. 44. cites 11 H. 6. 18.

3. The plaintiff may count by prescription in writ of annuity if it commences before time of memory, by composition, fine, or patent of the king. Br. Annuity, pl. 21. (bis) cites 19 H. 6. 74.

4. Debt upon arrears of annuity till he was promoted to a competent benefice, and shewed that such a day he took feme, and for the arrears due before, he brought the action, Choke demanded Judgment of the count, for this act changes the action of annuity into debt, and therefore ought to shew place, and by the best opinion for this default the count is not good. Br. Count, pl. 26. cites 35 H. 6. 50.

5. Annuity brought against the prior of M. in Southwark was præcipe, &c. quod reddat 10l. or 4 gowns, which are arrear of a certain annual rent of 5 marks, or one gown, &c. and the writ held good notwithstanding it was in the disjunctive with (or). Br. Annuity, pl. 33. cites L. 5. E. 4. 6.

6. Debt upon arrears of annuity, and counted of a grant out of the manor of D. and did not shew where the manor is, and yet well, because the action is founded upon the deed, and not upon the land. Br. Count, pl. 92. cites 7 E. 4. 26.

7. In annuity the writ was 10l. 7s. and in the count the 7s. was omitted. The plaintiff recovered, and it was reversed by error; for it is no misprision; for the count is by the party, and not by the clerk. Quod nota. Br. Annuity, pl. 21. cites 9 E. 4. 51. Br. Amendment, pl. 49. cites S. C.

8. Annuity of 10l. granted to him pro servitio impenso & impendendo, Br. Annuity, pl. 38.

cites S. C. & S. P. accordingly.

[ 518 ]

In annuity by prescription against a parson im-  
parsonce,  
per Jenour,  
if the seisin

be alleged before the appropriation, the plaintiff ought to allege the appropriation; and e contra where the seisin is after the appropriation, which Fitzherbert affirmed. Br. Annuity, pl. 2. cites 27 H. 8. 5.

As a man grants that when J. N. has infeoffed him of 4 acres of land, he shall have annuity of 10l. per ann.

there he ought to count that he has infeoffed him of 4 acres, &c. per all the justices. Ibid.

But where in debt upon bond for payment of an annuity on Lady-day, or within 20 days after, the plaintiff

assigned the breach in not paying the annuity at Lady-Day. It was moved in arrest that the original was brought 8 Apr. and he alleged the breach to be at Lady-Day last, which was within the 20 days, and so the action brought before he had cause of action; and the court held it an apparent fault. Cro. E. 565. pl. 29. Pasch 39 Eliz. C. B. Blunden's case.

S. C. & S. P. accordingly, that the conclusion does not make the count vicious; for the writ of annuity and the count in

it, is of rent as rent; and the annuity and the receipt of the annuity is mainoral, & quasi in demesne. Adjudged and affirmed in error. Jenk. 326. pl. 46. and says that many precedents are accordingly.

\* This should be D. 65. pl. 1. The same

*pendendo, and did not count that he had continued in his service. Pet Brian, There is a diversity where an annuity is granted to be an officer certain, as Parker or Bailiff, and where it is general pro servitio, &c. For in the case of special service he shall allege the continuance in the Bailiwick and Parkerhip; for he knows what service he shall do, and in the other case he does not know till the defendant commands him, and ordered him to answer. Note the diversity. Br. Count, pl. 72. cites 21 E. 4. 49.*

9. Where a parsonage has been charged with annuity, which is afterwards appropriated to a prior, there, in action against the prior, mention shall be made that he charges him as parson for doubt of double charge, and the defendant may plead this to the writ. Br. Annuity, pl. 40. cites 22 E. 4. 43.

10. If annuity be granted for life of J. N. and the grantee brings writ of annuity, and J. N. dies pending the writ, the action is determined, and the party shall have writ of debt of the arrears, and the count good, though the plaintiff did not shew the condition; for it is against him; but where the condition gives advantage to him, and makes the thing to commence, there he shall shew it. Br. Annuity, pl. 22. cites 14 H. 7. 31. and 15 H. 7. 1.

11. A grant was of an annuity for 2 years, payable at Mich. or 16 days after. In debt the plaintiff declared that it was in arrear at Mich. & adhuc in aretro existit. The defendant demurred, for that it is not averred that it was arrear 16 days after Mich. Sed non allocatur; for it being alleged that Adhuc a retro existit, which is long after the 16 days, it is well enough. Cro. E. 268. pl. 3. Hill. 34 Eliz. B. R. Brown v. Pendlebury.

12. A. granted a rent-charge to B.—B. brought a writ of annuity, and counts of a rent-charge granted to him, and concludes, by force of which he was seised in his demesne as of freehold. Adjudged upon a writ of error, and in affirmance of the judgment, that this is only a mistake of the law, and does not vitiate the declaration, which is good, and that this is no election to have this as a rent-charge. 2 Bulst. 148. Mich. 11 Jac. Sprat v. Hicks.

13. In annuity the plaintiff declared of a grant for his life by deed, *virtute cujus seifitus fuit in dominico suo ut de libero tenementa*. It was objected that this proves it a rent-charge, and no annuity, and



and so had made it his election to have it as a rent-charge; and cited \* D. 61. 3 E. 6. and † 220. 5 Eliz. Sed non allocatur; for being an annuity for life, though no rent-charge, such count is good; and though Bendlose took such exception in 3 E. 6. yet the court notwithstanding resolved for the plaintiff. Cro. C. 170. pl. 17. Mich. 5 Car. B. R. Bodvell v. Bodvell.

objection was taken; and the reporter says Quære bene, because no judgment

is entered on the roll. Brook's case.——Mo. 5. pl. 18 Baker v. Brooke, S. C. but this point of the count does not appear.——Dal. 5. pl. 10. S. C. but S. P. of the count does not appear.——Bendl. 34. pl. 55. S. C. & S. P. and all the court held the count good, and that the plaintiff ought to recover; but the parties had before compromised the matter between themselves.

† This should be 221. b. pl. 19.

(F. 9) Proceedings and Pleadings.

[ 519 ]

1. *Annuity by one parson against another parson, if the plaintiff recovers, and the defendant dies, the plaintiff shall have scire facias against the successor, and there riens arrear is no plea, nor it is no plea that the plaintiff has levied it, but he may say that the plaintiff has levied it by fieri facias, and the other e contra, and so to issue, but rien arrear is no plea against the record without shewing specialty, though the annuity was by prescription; for the judgment to recover it is a record; quod nota. Br. Scire Facias, pl. 198. cites 44 E. 3. 18.*

And see 46 E. 3. 5. that in scire facias upon recovery of an annuity, riens arrear is no plea.

Payments on Nihil debet is no plea

in debt upon arrears of annuity contrary to the specialty, but levied by distress in the manor of D. in the same county charged to the distress in the deed of annuity, with this conclusion, And so Nihil debet, is a good plea, but not levied by distress only, because the manor is in the same county. Br. Dette, pl. 114. cites 9 E. 4. 48. 53.——Br. Annuity, pl. 23. cites 9 E. 4. 53.

2. In writ of annuity, if the defendant made default after appearance, distress shall issue ad audiendum judicium suum; per tot. cur. Br. Annuity, pl. 11. cites 2 H. 4. 1. but cites 6 R. 2. contra.

Br. Process, pl. 27. cites S. C.

3. In annuity, release of all actions ratione debiti, compoti seu alterius cujuscunque contractus is no plea, where the plaintiff counts by prescription; for it may be before time of memory. Br. Annuity, pl. 42. cites 12 R. 2. and Fitzh. Release 29.

Debt upon arrears of annuity. The plaintiff declared of annuity

granted to him by deed for term of 10 years, &c. The defendant pleaded a release of the plaintiff of all actions personal after the grant of the annuity, and before the day of payment of it; and it was awarded by the justices, that it is no bar but for the arrears due before the release, and not for arrears due after the release; for these are not in action, nor due till the day of payment of them. Contra of obligation of day of payment to come; for there action does not lie till all the days are passed, and yet a release there is a bar pro toto; for upon obligation the sum is a duty immediately, but there day of payment is appointed to come; but upon annuity nothing is due till the day of payment. Note a difference. Br. Annuity, pl. 34. cites L. 5 E. 4. 40.——And after the same year, fo. 42. it was awarded that the plaintiff recover the arrears due after the release, for the cause aforesaid. Ibid.

4. In annuity the defendant came at the distress, and said that he had been at all times ready, &c. and yet is, and no plea at the distress. Br. Annuity, pl. 12. cites 2 H. 4. 3.

5. Annuity by the heir of the grantee against the heir of the grantor, who pleaded release of all actions and exactions personal, and it was doubted, if a release of actions personal be a bar in writ

of annuity, because a man shall only recover the annuity and the arrearages before the writ purchased, and pending the writ in writ of annuity *Quære, &c.* But Hank. saw the deed, and *the annuity was granted out of certain land in H. and was not granted for him and his heirs*, and so none is bound by it but the grantor himself, and not his heirs for him, *notwithstanding that he and his heirs grant the annuity to the grantee and his heirs*; for warranty cannot amend an estate, and the court agreed to the opinion of Hank. by which the plaintiff said no more of this. But Brooke makes a *quære* of this opinion; for it seems that this is *good law in a covenant, annuity, obligation, or warranty, but not in a grant of rent out of land*, as it seems. Br. Annuity, pl. 13. cites 2 H. 4. 13.

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6. Annuity upon a grant made *till he was promoted to a competent benefice, and declared of arrears for 4 years.* The defendant pleaded *acquittance for 2 years, and to the rest that he presented him to such a competent benefice, and he refused.* The plaintiff said that he at the time was but of 22 years of age, and not of 24 years, and born at K. in the county of N. and that the law of the church is, that none shall take benefice of cure before 24 years of age, and this was the vicarage of D. and benefice with cure, and of the acquittance he was discharged; for this plea goes to all, and to the extinguishment of the annuity, and then debt will lie of the arrears before, and not writ of annuity. Port. said he was of the age of 24 at the time of the presentation, *prist.* Yelverton said he was but of 22 years, *absque hoc* that he was 24 years, &c. Br. Annuity, pl. 20. cites 19 H. 6. 54.

7. In annuity the plaintiff counted of 10l. per ann. by prescription. The defendant said that the predecessor of the plaintiff had 10l. per ann. for a portion of tithes in D. for his life, and died, and this plaintiff made Prior, and the defendant presented Parson, *absque hoc* that he and his predecessors, time out of mind, have been seised of annuity of 10l. prout, &c. and a good plea with the traverse, and no plea without the traverse. Br. Annuity, pl. 21. (bis) cites 21 H. 6. 2.

Br. Traverse per, &c. pl. 382. cites S. C. & S. P. accordingly; but says, hat it

seems contra if the plaintiff had declared upon grant of annuity.

8. In annuity the plaintiff declared upon prescription, the defendant said that it was granted upon condition, which is broken of the part of the plaintiff, and no plea, per cur. without traversing the annuity by prescription; for annuity by prescription, and annuity by grant upon condition, cannot be intended one and the same annuity. Br. Confess and Avoid, pl. 63. cites 32 H. 6. 4.

9. In annuity against an executor, the plaintiff counted upon a grant of annuity made by the testator for term of years, which yet continues, by which part was arrear in the time of the testator, and part in the time of the defendant executor; and as to the arrears in the life of the testator, the defendant pleaded a release of the plaintiff to the testator of all actions, and to the residue fully administered; *quære* if the last plea does not go to all; and see, that as long as the annuity continues writ of annuity lies, and not writ of debt, though the annuity be only for years. Br. Annuity, pl. 29. cites 39 H. 6. 28.

10. Annuity granted *Quamdiu fuerit benevolens, preferens & amicus* to the grantor, the defendant said, that before any day of payment the defendant was in service with D. for 4 marks per ann. and the plaintiff laboured and prayed D. to oust him out of service, by which he was put out of service, &c. and it is not double, viz. the labouring, and the putting out, per cur. For the labour suffices for all; Quod nota. Br. Double, pl. 100. cites 7 E. 4. 16.

11. In annuity, *riens arrear* is a good plea in this action where the plaintiff declares upon prescription, for this is only matter in fact. Br. Annuity, pl. 31. cites 5 H. 7. 33. Contra where the plaintiff counts upon a deed, for

this is specialty; Quod nota differentiam per cur. Quod nota bene. Ibid.—S. P. Br. Annuity, pl. 22. cites 14 H. 7. 31. and 15 H. 7. 1. and *refusal* is a good plea, for by the refusal the annuity is determined, because the church ought not long to continue void, and therefore he need not say that he is yet ready.—Contra upon *seoffment*, for he may infeoff him after; but quære thereof; for it seems that the refusal suffices, as in Littleton, tit. Estates. Ibid.

12. In debt upon arrears of annuity, the defendant said, that he leased such land to the grantee in recompence of the annuity, or of the arrears of the said annuity, this is no plea, per cur. For the annuity is by writing, which cannot be discharged by matter in fact; Quod nota. Brooke says, Quære if it was annuity by prescription. Br. Annuity, pl. 1. cites 19 H. 8. 9. In annuity of 10l. and the plaintiff promised to him, that if he paid to him yearly at Easter

20s. the annuity should be void, and said, that he paid, except at Easter last, and then leased to the plaintiff the use of an acre of land for the 20s. and a good plea, per cur. and it seems that the promise was in writing, and there it is agreed, that for annuity, though land be thereof charged, yet another thing in recompence suffices. Br. Annuity, pl. 54. cites 11 H. 7. 20.

13. Annuity, &c. the plaintiff counted of the grant of R. prior of C. and his convent, by which it was arrear by 5 years, the defendant said, that it was granted till the plaintiff was promoted to a sufficient benefice by the said R. and that R. died, and the defendant is now prior, and that such a day he tendered to him a benefice, pending the writ, and he refused it, and the opinion was in a manner clear, that the tender, pending the writ, shall abate the writ of annuity, and shall determine the annuity, for it seems to be upon condition in law, and when the condition is performed, the annuity is determined, and he may plead this matter tender of the arrears. Br. Annuity, pl. 22. cites 14 H. 7. 31. and 15 H. 7. 1. [ 521 ]

14. If a person has an annuity out of the vicarage, and enters into the vicarage, this is no bar in writ of annuity; for the person of the vicar is charged, and not the possession. Br. Annuity, pl. 26. cites 21 H. 7. 1.

15. A writ of annuity was brought upon a prescription against a rector of a parish church. The defendant pleaded, that it was overflown with the sea, &c. But the court were clearly of opinion for the plaintiff; for the church is the cure of souls, and the right of tythes, and if the material fabrick of the church be down, another may, and ought to be built, and judgment nisi for the plaintiff. Mod. 200. pl. 32. Pasch. 27 Car. 2, C. B. Anqn.

## (F. 10) Pleadings. What is a good Plea without shewing Deed.

1. **T**HE plaintiff in his *count* ought to shew deed in debt and annuity, and there the writ and specialty ought to agree, per Finch. Br. Monstrans, pl. 15. cites 41 E. 3. 23.

Br. Arrear-  
ages, pl. 4.  
cites S. C.

*Scire facias*  
as upon re-  
cord of an  
annuity, the  
defendant  
demanded  
oyer of the

2. *Scire facias* by an abbot against a parson upon arrears of annuity upon recovery against the predecessor of the parson, he pleaded as to the arrears recovered against his predecessor, that he had levied it of his predecessor, & non allocatur, because he did not shew specialty, by which he said, that he had levied it of his predecessor by *fieri facias*, and the other e contra. Br. Annuity, pl. 9. cites 44 E. 3. 18.

deed of annuity, and could not have it, inasmuch as the action is founded upon the record, and not upon the deed, for be it a deed or not the judgment shall bind. Br. Monstrans, pl. 6. cites 3 H. 6. 40.

Br. Arrear-  
ages, pl. 4.  
cites S. C.

— Br.  
Execution,  
pl. 18. cites  
S. C.

3. And to the arrears incurred after the judgment he tendered averment that he had paid, and did not shew thereof acquittance, by which it was awarded, that the plaintiff recover as well the arrears incurred pending the writ as before, notwithstanding the issue which pends of the arrears due before the first judgment against the predecessor, and therefore judgment given of parcel immediately. Br. Annuity, pl. 9. cites 44 E. 3. 18.

So upon *sci-*  
*re facias*.

Br. Arrear-  
ages, pl. 4.  
cites S. C.

• Br. Annu-

4. And it is said, that in writ of annuity upon \* prescription, or upon grant by deed, a man shall not plead riens arrear without acquittance; Quod nota; & mirum of prescription. Br. Annuity, pl. 9. cites 44 E. 3. 18.

ity, pl. 48. cites 37 H. 6. 19. contra, for there he is not charged by deed.

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5. In annuity *Nil debet* or *riens arrear* is no plea without shewing the deed, contra if it be out of land with clause of distress, to say that he levied by distress, this is good without shewing the deed. Br. Monstrans, pl. 138. cites 9 E. 4. 53.

Payment of  
part, pending  
the writ, is  
no plea  
without  
specialty;  
for it is no  
plea in bar  
without  
acquittance  
in annuity  
by deed;

contra in avowry for a rent-charge, per Catesby, for levied by distress is a good plea there; quod nota. Br. Annuity, pl. 51. cites S. C.

6. Annuity by J. B. against W. D. upon grant by deed out of the manor of S. with a clause of distress; Suliard demanded judgment of the writ, for the plaintiff after the action brought had received 10s. of the arrears of the same annuity, and so has abated his own writ; per Brian, the plea is not good without shewing specialty of the receipt, no more than in debt upon obligation; per Catesby, peradventure if the plaintiff would have distrained and made avowry, then it may be a good plea without specialty. Br. Annuity, pl. 41. cites 22 E. 4. 51.

\* S. P. Br.  
Annuity,  
pl. 48. cites  
37 H. 6. 19.

7. Where he charges his person by writ of annuity, \* payment is no plea without specialty. Contra in avowry. Br. Annuity, pl. 41. cites 22 E. 4. 51.

(G) Judgment.

(G) Judgment.

Fol. 229.

[ 1. ] If a man brings an annuity, and demands arrearages, if the defendant pleads an acquittance of the arrearages, the plaintiff may have judgment presently to recover the annuity. 30 E. 3. 22.]

[ 2. In an annuity, if the defendant traverses the title, if the title be found for the plaintiff, but that no arrearages are behind, but at one term pending the writ, yet the plaintiff shall have judgment to recover the annuity and arrears. 39 E. 3. \* 38.]

Br. Annuity, pl. 25. cites 39 E. 3. 38. and that the count was

upon a prescription, and judgment accordingly for the plaintiff, and yet the arrears so found was not parcel of the issue. Quod nota.

\* All the editions of Br. are according to this of Roll; but the Year-book is 39 E. 3. (37. b.)

[ 3. In a writ of annuity, if the plaintiff demands a certain sum for a year and a half ended at Michaelmas, before the action brought, where there is another quarter past between Michaelmas and the writ purchased, scilicet, the feast of Christmas, the annuity being payable quarterly, and upon Non est factum pleaded, this is found for the plaintiff, in this case the judgment ought not to be for the said quarter due at Christmas next before the original purchased, though he ought to recover the arrears incurred pending the action; for it shall be intended that this quarter being past, and not demanded by the plaintiff, was paid before the action brought. Hill. 11 Car. B. R. between Frank and Stukely, per curiam, in a writ of error; and they gave a peremptory rule to reverse the judgment given in bank accordingly for Christmas quarter; but this was after stayed for an exception to the writ of error. Intratur Hill. 10 Car. Rot. 990.]

Tit. Error, (K) pl. 17. S. C. but S. P. does not appear. —Tit. Heir (C) pl. 7. S. C. but S. P. does not appear. —Cro. C. 436. pl. 6. Clotworthy v. Clotworthy, S. P. and seems to be S. C. adjudged accordingly.

———S. C. cited 2 Vent. 129. as adjudged accordingly.

4. In annuity the plaintiff counted upon prescription, and the defendant traversed it, and it was found against him; for that nothing was arrear but for one term pending the writ, by which it was awarded that the plaintiff recover the annuity, and the arrears found by the inquest, and yet this was not parcel of the issue. Quod nota. Br. Annuity, pl. 25. cites 39 E. 3. \* 38,

\* This should be (37. b)

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though all the editions of Br. are (38.)

5. In annuity the plaintiff recovered the annuity and the arrearages before the writ brought, and pending the writ also; quod nota, per judicium curiæ. Br. Arrearages, pl. 14. cites 2 H. 4. 3.

Note that in facias upon a recovery in

writ of annuity, the plaintiff cannot recover the arrearages and damages incurred pending the first facias, but pending the first writ; quod nota, per judicium. Br. Arrearages, pl. 10. cites 9 H. 5. 7.

A parson recovered annuity in the time of E. 2. and his successor brought five facias in the time of E. 4. to execute this judgment, and this is of arrearages incurred tempore proprii. Br. Arrearages, pl. 15. cites 21 E. 4. 83.

6. In annuity the defendant came at the distress, and said that he had been at all times ready, &c. and yet is, and no plea at the distress;

Q q 4

by

by which Rickhill, *ex assensu curiæ*, ruled that he recover the annuity and the arrears before the writ purchased, and after the writ purchased pending the suit, and damages to half a mark, and the defendant in misericordia. Br. Annuity, pl. 12. cites 7 H. 4. 3.

7. In annuity a man shall recover arrears as well pending the writ, till judgment, as before the writ brought. Br. Annuity, pl. 16. cites 7 H. 4. 16.

2 Bulst.  
279. Marth  
v. Bentham,  
S. C. and  
judgment  
affirmed.—  
11 Rep. 56.  
Bentham's  
case, S. C.  
and judg-  
ment affirmed.

8. In a writ of annuity the parties were at issue upon a prescription, and the jury found for the plaintiff, but no damages; but before judgment the plaintiff released the damages, and had judgment to recover the annuity. This was assigned for error; but though damages should have been given, yet the plaintiff having released them, the judgment was affirmed. Roll. Rep. 88. pl. 40. Mich. 12 Jac. B. R. Bent v. Marth.

### (H) [Judgment.] How to be executed.

But where a recovery was in an annuity by a prior alien, and afterwards all the temporalities of all priors aliens were seized into the king's hands, and so continued for several kings reigns, and afterwards H. 5. gave this annuity to the prior of a priory newly founded by him. It was objected, on a scire facias brought by the prior, that it would not lie for him for default of privity. Rede Ch. J. held that the prior might sue either a writ of annuity or a scire facias; and Palmes agreed that he might have writ of annuity, but not the scire facias. And afterwards they all agreed as to the scire facias. Kelw. 168. 170. pl. 12. Mich. 6 H. 8. The Prior of Sheene v. the Prior of Malverin.

[ 1. ] IF a man recovers in an annuity, he shall never after have a new writ of annuity for the arrearages recovered. 21 E. 3. 22.]

\* Br. Scire Facias, pl. 75. cites S. C. & S. P. according-ly, and that [ 2. But within the year he shall have an *elegit* or \* *fieri facias* to execute them. 21 Ed. 3. 22. 24 Ed. 3. 23. 1 Ed. 3. 3.] [ 3. And after the year a \* *scire facias*. 21 Ed. 3. 22. 24 Ed. 3. 23. 1 Ed. 3. 3.]

in which case he shall have scire facias from year to year ever afterwards to recover the annuity, because it is always executory.—Br. Annuity, pl. 17. cites S. C. & S. P. and that it is always executory, because it is annual; per Thirning, & non negatur.

Judgment in annuity is *always* executory, and shall have scire facias after scire facias for all the arrears which is arrears after the judgment. Contra it is of scire facias upon other judgment; for the first is pro toto. Br. Annuity, pl. 50. cites 8 E. 4. 18.

Annuity lies (though the annuity continues) to recover the annuity and arrears; but for the future there must be a *scire facias* on the judgment. 5 Mod. 144. Mich. 7 W. 3. Davis v. Speed.

[ 524 ] [ 4. But if a man recovers an annuity against a parson by *Nisi dedire* without the aid of patron and ordinary, and the parson dies within the year, execution shall be sued against the successor within the year by scire facias, and not by a *fieri facias*. 24 Ed. 3. 23.]

Fitzh. Execution, pl. 89. cites S. C. & S. P. according-ly; and it was said that if the parson had had aid it would be all one.—Br. Annuity, pl. 52. cites S. C. that he shall have scire facias against the successor, and not against the executor; but says it does not appear whether it was of arrears incurred in the time of the predecessor.

After judgment in annuity once

[ 5. If a man recovers in an annuity, he shall never have a new writ of annuity for the arrearages incurred after the recovery but a *scire*



*scire facias*, because the judgment is always executory. 21 Ed. 3. 22. had, a *scire facias* shall issue upon  
24 Ed. 3. 23. 30 Ed. 3. 22.]

this judgment only, for the arrearages incurred before; and the plaintiff shall by this *scire facias* recover the arrears incurred pending the writ. Jenk. 51. pl. 98.

But if the annuity be determined, (because the *scire facias* is in the place of the writ of annuity) although the arrears were due before the *scire facias* was brought, yet the *scire facias* does not lie, but *debt only*. Jenk. 51, 52. pl. 98.

[6. So it seems that for the arrearages incurred after the recovery, he ought to have a *scire facias* within the year, and not a *fieri facias*, because the defendant may plead any discharge thereof. Contra 30 Ed. 3. 22. Contra 1 Ed. 3. 3.]

7. *Scire facias* upon judgment in writ of annuity; the plaintiff prayed the arrears pending the writ of *scire facias*, and could not have it; for the *scire facias* is only to execute the first judgment, and shall not vary from the sum; quod nota. Br. *Scire Facias*, pl. 85. cites 9 H. 5. 12.

8. If there be judgment for an annuity, and the annuitant sells the annuity afterwards, the vendee shall have a *sci. fa.* upon this judgment, per North K. Vern. 283. in case of Dan v. Allen.

## (I) Judgment. Plea in *Scire Facias* after Judgment.

1. **S**CIRE *facias* of arrears incurred of annuity at another time recovered after the judgment given, the defendant pleaded *riens arrear*, and the court was in doubt whether he shall have the plea or not. Br. Annuity, pl. 4. cites 28 H. 6. 8.

2. Where recovery is of the annuity, it is no plea in *scire facias* that the plaintiff has entered into part of the land of the vicar, or of the abbot, or of the heir; for the person is charged, and no land. Br. Annuity, pl. 36. cites 10 E. 4. 10.

3. Annuity was recovered against a parson, and after tithes was granted to the king, and the arrears of the annuity were levied to the king for the tithe of the plaintiff, and this is a good plea in *scire facias* of it. Br. Annuity, pl. 53. cites 21 H. 7. 16.

4. J. S. had an annuity granted him for life *pro exercitio officii seneschalli*, and brought a writ of annuity, wherein he got judgment, and for arrears due afterwards he brought a *scire facias* upon the judgment; the defendant pleaded, that pending the writ the plaintiff was requested to hold a court, &c. and refused, without answering to the arrears incurred before the *sci. fa.* brought, and all the justices and clerks held the plea good. D. 277. pl. 28. Trin. 23 Eliz. Anon.

S. P. though in case of the heir he is not charged but by assents. Br. *Scire Facias*, pl. 179. cites 10 E. 4. 10.

## (K) Judgment.

## (K) Judgment. Remedy for Arrears incurred after a Judgment.

Br. Execution, pl. 34. cites S. C. —Br. Scire Facias, pl. 75. cites S. C. —S. C. cited F. N. B. 152. (C) in the new notes there (a) accordingly, but that for the arrears incurred after the judgment the executor shall have a writ of debt and not a sci. fa.

1. **W**HERE a man has annuity for life, and brings writ of annuity, and recovers and dies, his executors shall not have scire facias of the annuity to recover the annuity, for this is determined by the death of the testator, but they may have sci. fa. to recover the arrears recovered by the first judgment in the first action. Br. Annuity, pl. 17. cites 11 H. 4. 34.

Br. Execution, pl. 34. cites S. C. —Br. Scire Facias, pl. 75. cites S. C. —F. N. B. 152. (C) in the new

2. If a man has annuity for life and 20 years over, and he recovers in writ of annuity and dies, his executors shall not have scire facias to recover the annuity during the term, for the first judgment was given of the franktenement, and not of the term, therefore they shall have scire facias of the arrears adjudged, and writ of annuity of the annuity itself, by the best opinion. Br. Annuity, pl. 17. cites 11 H. 4. 34.

notes there (a) cites S. C. and that it was held by Hort, and Thirn. against the opinion of Hankf. that in such case the executor shall have a sci. fa. always during the term; because they have the estate continuing in them during the term; but says quare of an annuity after the grant determined, and cites 9 H. 6. 16. And if one recovers in an annuity, and the annuity is after in arrear, and then he dies, his executors shall not have a sci. fa. but debt, and cites 11 H. 6. 38.

After judgment in annuity once had, a sci. fa. shall issue upon this judgment only for the arrearages incurred before, and the plaintiff shall, by this scire facias, recover the arrears incurred pending the writ; but if the annuity be determined, (because the scire facias is in the place of the writ of annuity) although the arrears were due before the scire facias was brought, yet the scire facias does not lie, but debt only. Jenk. 51. pl. 98.

3. If a man has an annuity by deed or prescription, and he brings a writ of annuity and has judgment, he shall never afterwards have another writ of annuity as long as that judgment stands in force, though the annuity be of inheritance, but shall have a sci. fa. because the matter of the specialty or prescription is altered by the judgment into a thing of a higher nature. 6 Rep. 45. a. cites 37 H. 6. 13. b.

For more of Annuity in general, See Condition, Debt, Rent, and other proper Titles.

## Appeal.

\* (A) Appeal of Murder. Who shall have it.  
The Wife. Not other Feme.

\* It being alleged by some, and especially by Treby Ch. J. that an appeal was a revengeful

1. 9 H. 3. cap. 34. **N**O man shall be taken or imprisoned upon the appeal of a woman for the death of any other than of her husband.

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odious prosecution, and therefore deserved no encouragement; on which occasion Holt, with great vehemency and zeal said, that he wondered any Englishman should brand an appeal with the name of an odious prosecution; that for his part he looked upon it to be a noble prosecution, and a true badge of English liberties, and referred to the statute of Gloucester, and the comment thereupon in 2 Inst. 12 Mod. 375. Pasch. 12 W. 3. in case of Stout and Fowler.

For this word Appeal see Litt. f. 500. and Co. Litt. 287. b.—At the common law, before this statute, a woman as well as a man might have had an appeal of death of any of her ancestors, and therefore the son of a woman shall at this day have an appeal, if he be heir at the death of the ancestor, for the son is not disabled, but the mother only, for the statute says, Propter appellum feminæ. 2 Inst. 68.

Pleta says, *Femina autem de morte viri sui inter brachia sua interfecit, & non aliter poterit appellare*, and therewith agree the Mirror, Britton and Bracton. 2 Inst. 68.—2 Inst. 317. 317. S. P. cites Bracton and Britton.—St. P. C. 58. b. S. P.

By inter brachia in these ancient authors, is understood the wife, which the dead had lawfully in possession at his death, for she must be his wife both of right and in possession, for in an appeal *unques accouple* in loyal matrimony is good plea. 2 Inst. 68.—2 Inst. 317. S. P. and that there must be no divorce.—St. P. C. 59. a. Ne unque accouple, &c. is a good plea in bar.—S. P. accordingly, Br. Appeal, pl. 17. cites 50 E. 3. 15.—2 Hawk. Pl. C. 164. f. 36. says, that if the meaning of (inter brachia) be according to Sir Edw. Coke, it seems at least to follow, that if the husband were divorced from the wife at his death, though by a voidable sentence she cannot maintain an appeal, yet it is generally holden, that a wife who has eloped from her husband may have an appeal of his death; and Stamford seems to understand (inter brachia) to be, that the wife ought to have had the deceased in her view, and to have been present at his death, which is most certainly not necessary at this day.

The judges are so far bound to take notice of this statute, that if a woman brings an appeal of death of her father, or of any other besides her husband, they ought *ex officio* to abate it, though the defendant takes no exception to it. 2 Hawk. Pl. C. 166. cap. 23. f. 42.—Fitzh. Office del Court, pl. 7. cites Pasch. 10 E. 4. 7.

2. If a man be killed who has no feme nor son, and his daughter, sister, or other cousin, who is a feme, is his heir, and he has an uncle or other male cousin who is not heir, but of the kin, she shall not have appeal; for the statute of *Magna Charta*, cap. 34. is, that none shall be taken by appeal of a feme, unless of the death of her husband, and therefore the appeal is lost. Br. Appeal, pl. 68. cites 27 Ass. 25.

Co. Litt. 25. b. S. P.

3. A feme shall have appeal where she shall not have dower, as where she elopes from her baron. Br. Appeal, pl. 17. cites 50 E. 3. 15. per Ingleby.

St. P. C. 59. (C) S. P. accordingly. 2 Inst. 317.

says, that there must be no elopement.—2 Hawk. Pl. C. 164. f. 37. cap. 23. says, it is said she may have it; for by the common law she might have both dower and appeal, and that the stat. W. 2. cap. 34. which takes dower from her, leaves the appeal as before.—Co. Litt. 33. b. says it is no bar of the appeal, and that for the reason here mentioned by Hawkins.

4. If

If she has judgment of death against the defendant, if after she takes husband, she can never have execution of death against him. 2 Inst. 69. — 2 Hawk. Pl. C. 164. cap. 23.

4. If a feme brings appeal of the death of her baron, and *convicts the defendant*, and takes another baron before execution, if the defendant gets charter of pardon, this shall not be allowed before the baron and feme are warned, and the feme shall have execution notwithstanding the coverture, per Skrene; but per Gascoign Ch. J. it is not so, for the feme has disabled herself by the taking of the 2d baron, and by the justices of B. R. M. 2. M. 1. she shall lose her appeal by taking of the 2d baron; for the cause of appeal is, that she wants her baron, therefore when she has another baron the cause ceases, and *cessante causa cesset effectus*, and the same it seems of the execution of the appellee. Br. Appeal, pl. 148. cites 11 H. 4. 48.

f. 38 S. P. but says it seems clear, that in such case the appellee shall not be discharged without the king's pardon, and that he does not find it settled what ought to be done with the appellee in this case; but it seems certain, that the king cannot proceed against him by way of indictment, because he is attainted already; and therefore it may be properly argued, that the court may award execution of him ex officio, or at least at the demand of the king; for otherwise he would save his life by reason of the attainder by which he is adjudged to lose it.

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Br. Appeal, pl. 131. cites 2 Aff. 3.

S. P. — If the husband be at-

tainted of treason, &c. and any person kills him, the wife shall have an appeal. Co. Litt. 33. b. — 3 Inst. 215. (a) S. P. for notwithstanding the attainder he remains her husband, and his body is not forfeited to the king, but till execution, remains his own.

S. P. and so if attainted of high treason, yet if he be slain, his

wife shall have an appeal, for notwithstanding the attainder he was Vir suus, but the heir cannot have an appeal, for the blood is corrupted between them. 2 Inst. 69.

But no one except the wife can bring an appeal of the death in such case, because in this case, and likewise in the case of treason, he can have no heir. 2 Hawk. Pl. C. 165. cap. 23. f. 40.

7. Appeal by a feme grossly enseint, of the death of her husband, and the defendant was attainted at the suit of the feme, and the appearance of the feme recorded for all the term. Br. Appeal, pl. 112. cites 21 E. 4. 72.

Jenk. 137. pl. 82. S. C. accordingly.

8. It is a question, if a feme sole brings appeal as she ought, *process continues till the defendant be outlawed*, and the feme takes baron, whether she may demand execution. But per Brian and Huiccy, she may demand execution. Er. Appeal, pl. 112. cites 21 E. 4. 72.

\* S. P. Br. Appeal, pl. 112. cites 21 E. 4. 72. — St. P. C. 59. (B) S. P. and by the 2d marriage her appeal is

9. Note, if a feme who has title of appeal of the death of her husband takes other husband, he and the feme shall not have appeal; for the feme ought to have it sole, and so \* *the appeal determined*; and the reason is because the feme not having a husband is not so well able to live, and therefore when she has another baron the appeal is determined. Br. Appeal, pl. 109. cites 1 M. 1.

her appeal is gone notwithstanding the 2d baron dies within the year and day of the first terra

cites Trin. 20 H. 6. 46.—2 Inst. 68, 69. S. P. accordingly; for she must before any appeal brought continue *femina viri sui*, upon whose death she brings the appeal.—2 Hawk, Pl. C. 164. cap. 23. s. 38. S. P. for being given her only from a regard to her widowhood, it cannot but cease when that determines, and being once barred it is barred for ever.

## (B) Appeal of Murder. Who shall have it. The heir.

1. **T**HE heir of him who dies outlawed shall not have appeal. But this seems to be outlawry of felony, which is corruption of blood. Ibid.—S. P. Br. Appeal, pl. 131. cites 2 Aff. 3.—Br. Corone, pl. 67. cites 2 Aff. 3. that where A. being outlawed of felony was killed by J. S. yet J. S. was arraigned of it; and Brooke said, but see elsewhere that the heir shall not have appeal by reason of the corruption of blood. Br. Appeal, pl. 116. cites 2 E. 3. Fitzh. Coron. 40.

2. In appeal, if a man be killed who has no feme nor son, and his daughter, sister, or other cousin, who is a feme, is his heir, and he has an uncle or other male cousin, who is not heir but of the kin, she shall not have appeal; for the statute of *Magna Charta* 34. is that none shall be taken by appeal of feme but of the death of her husband, and therefore the appeal is lost. Br. Appeal, pl. 68. cites 27 Aff. 25.

3. The husband was killed, and afterwards the wife died within the year. The heir shall not have appeal, because the appeal was once given to the wife, so that the action was once out of the blood, and therefore cannot be given to the blood again. Keilw. 120. a. pl. 65. *Casus incerti temporis*. St. P. C. 59. b. (E) S. P. cites Trin. 20 H. 6. 46. by Fortescue and Newton, though she died before any appeal commenced.—2 Hawk. Pl. C. 164. cap. 23. s. 39. S. P. and cites S. C.

4. If a man has action of appeal of the death of a man and dies within the year, and the suit descends to several one after another within the year, there the last to whom it descends shall have the appeal notwithstanding the death of the others to whom it was first given. Per Thirn. quod curia concessit. But Gascoigne Ch. J. held strongly contra. And Brooke says it seems the law is with him. Br. Appeal, pl. 30. cites 11 H. 4. 11.

the pardon of the king granted to the defendant was allowed upon the death returned in a *scire facias* against the plaintiff without suing other *scire facias* against the heir of the plaintiff, for the appeal is given to the heir of the deceased only, and it is action personal, which dies with the person. But per Grevil, Mordant, and Wood, *scire facias* shall issue against the heir of the plaintiff, for the heir shall have appeal within the year if he has not been nonsuited, nor released the appeal, for within the year it shall descend from heir to heir if it was to 20 heirs, for it is a special punishment given to the blood, and the execution shall ensue the original, and therefore when he is outlawed, nothing rests but to make execution, and therefore if the plaintiff dies before execution the heir shall have it, and so *scire facias* shall issue to warn the heir. But per Constable, Keble, and others *e contra*, and that in the time of R. 3. it was adjudged that *scire facias* shall not issue against the heir, and that it is only a personal action which dies with the person, and therefore if he to whom it is given dies within the year, it shall not descend to the heir. Br. Appeal, pl. 88. cites 9 H. 7. 5.

• S. P. Br. Appeal, pl. 141. cites 38 H. 6. 13.—Ibid. pl. 144. cites 9 H. 7. 5. S. P.—And therefore per Vavisor, if a man brings appeal and is nonsuited, or dies within a year or after, the heir shall not have appeal, and constable to the same intent strongly. Ibid.—Jenk. 182. pl. 70. cites S. C. and S. P. and that the suing a *scire facias* against the heir would be in vain; for the appeal which was once begun dies with the appellant, and does not descend; but that it would be otherwise if it had not been begun, for there it descends; by the judges of both Benches.—In appeal, if

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Appeal of death by the heir, the plaintiff died after the defendant was outlawed in the appeal, and by Judgment

if the next heir dies after the appeal brought, the appeal is lost; per Treby Ch. J. Arg. 2 Ld. Raym. Rep. 434. at the Top. Hill. 10 W. 3.

But they agreed that 11 H. 6. 11 H. 4. 11. is that if the father has 2 sons, and is killed, and the eldest does not take appeal within the year, the 2d son shall have action; for he has it as immediate heir to the father, and not as heir to the eldest son. But *quere* inde; for he was not immediate heir, but he need not make mention now of the elder brother. Br. Appeal, pl. 88. cites 9 H. 7. 5.—St. P. C. 59. b. (K) S. P. cites Trin. 20 H. 6. 46.

*Contra* where there is grand-father, father, and son, and the grand-father is killed, and the father dies, the son shall make mention of the father; and Vavisor agreed with Keble and Constable, and denied all that Grevill and the others said, and that the appeal is not ancestrel, nor can it descend; and after judgment was given by advice of all the court, that the pardon shall be allowed, and the defendant went quit without suing *scire facias* against the heir. Quod nota. Br. Appeal, pl. 88. cites 9 H. 7. 5.

\* S. P. Br. Appeal, pl. 141. cites 38 H. 6. 13.

If a man is outlawed in appeal, and the plaintiff dies, his \* heir shall not have execution; per cur. For if the heir commences the appeal and counts, and after dies, his heir shall never have appeal, nor no other; but if the heir, after the death of his ancestor who is killed, dies, and cannot appeal, there the heir of the heir shall have appeal. Br. Appeal, pl. 156. cites 16 H. 7. 15.

\* Br. Appeal, pl. 144. cites 9 H. 7. 5. S. P.

If an appeal be commenced by an heir who dies, *hanging the writ*, it seems to be agreed by almost all the books, that no other heir can afterwards proceed in such appeal, or commence a new one, because it is a *personal action* given to the heir in respect of his immediate relation to the person killed, at the time of his death, and like other personal actions shall die with him; but some have held, that if the first heir dies within the year and the day without commencing an appeal, the next heir may bring one, but this is doubted by others, and the generality of books seem to favour the contrary opinion, as more agreeable to the general tenor of the law in relation to appeal, which in no case, as the Serjeant says he knows of, will suffer the right of bringing an appeal to be transferred from one to another, and compares it to the case of a wife dying within the year and day in whom the right of appeal is vested, no heir shall have appeal; but that it is held by Sir Matt. Hale, [Hale's Pl. C. 182.] and some others, that if the first heir gets judgment in appeal of death and dies, his heir may have execution. But that Stamford [St. P. C. 59. b. (I) cites Trin. 16 H. 7. 15.] doubts this, and seems contrary to many of the old books, and not easily reconcilable with the reason of the cases above-mentioned. But whether in this case the court may not award execution either ex officio, or at

the demand of the king, may deserve to be considered. Also if a person killed has no wife at his death, and no issue but daughters, and all these daughters die within the year and day, it may reasonably be argued, that the heir male may have appeal, because the right of bringing one never vested in any other before; but says he does not find this case in any of the books. 2 Hawk. Pl. C. 165, 166. cap. 23. s. 41.

S. C. cited  
Co. Litt.

25. b.—

If the appellant be  
heir and male,  
though he derives through  
females he  
shall have  
the appeal.

Hale's Pl.

C. 182. 183.

—2 Hawk.

166. cap.

23. s. 42.

says it seems

to be the

better opi-

nion at this

day, that

the heir

male of the

deceased

who derives

his blood

through a

female may have an appeal,

As the uncle being heir on the part of the mother, or the grandson

by a daughter &c. And yet the mother in the first case, and the daughter in the 2d could have

5. Feme has issue a son who is murdered, and has no heir of the part of his father; the question was, Whether the uncle of the part of the mother shall have appeal or not. Billing Ch. J. Needham and Choke J. said that the appeal does not lie because he conveyed by feme, and that by the statute of *Magna Charta* 34. a feme shall not have appeal but of the death of her baron. But Brian, Neal, Littleton, and the Chief Baron e contra, and that the uncle shall have appeal of the death of his nephew, and yet the father by whom he made his conveyance, shall not have appeal of the death of his son no more than the mother of the son. Billinge said that it is not alike, for the father is able to have appeal of the death of his ancestor, contra of a feme, and therefore here because the mesne in the conveyance was disabled the appeal does not lie, and so adjudged H. 20 H. 6. 43. tit. Coron. in Fitzh. 9. where grandfather, mother and son were, and the mother died, a man killed the grandfather, the son shall not have appeal, because he conveyed by the mother who is a feme, and never could have had appeal, quod nota by award, and there it is said that \* appeal shall not descend, for he upon whom it first falls shall have it, but if he dies, his heir shall not have it. Br. Appeal, pl. 104. cites 17 E. 4. 1.

And yet the mother in the first case, and the daughter in the 2d could have



had no appeal; for since by the common law such mother, and daughter had not only such a right to bring such appeal but also to have such right derived through them to others, it seems hard to construe the statute by depriving them of the former to take from them the other also, especially considering that an heir male, who derives his blood through females, seems no way less worthy to bring an appeal than if had derived it through males; and all statutes made in abridgment of any right of the subject ought to be construed strictly.—\* S. P. Br. Appeal, pl. 141. cites 38 H. 6. 13.

6. Appeal was brought by the *son against his father, of the death of the mother of the plaintiff*, and held good, for he is heir to the mother, for appeal lies as well of the death of a woman as of the death of a man. Br. Appeal, pl. 106. cites 18 E. 4. 1. St. Pl. C. 60. a (B) cites S. C.— So if the feme kills the baron,

their son shall have the appeal *against his mother*, for he is heir to the father who is dead. Quod nota. Br. Appeal, pl. 106. cites 18 E. 4. 1.—St. P. C. 59. a. (D) S. P.—A woman poisoned her husband, which is treason by the statute 31 H. 8. the heir brought an appeal of murder against his mother; but the reporter says that the opinion of the justices was (ut audivit) that the appeal was not maintainable. D. 50. pl. 4. 5. Mich. 33 H. 8. Saccomb's case.—D. 50. a. pl. 4 in marg. says the reason seems as the remarker thinks, not because the treason extinguishes the murder [as mentioned in the principal case] but he intends that the king at his election may indict her of murder or treason; but that the reason is, that the life of a man shall be put but once in jeopardy, and the king being intitled by matter of a more high nature, his remedy shall not be obstructed by the suit of the party.—2 Hawk. Pl. C. 165. cap. 23. S. 39. says if the petit treason be pardoned by the parliament, it seems that the heir can bring no appeal; for he cannot bring it for the murder only because the petit treason includes murder, and more, and that being the greater drowns the less, and therefore the pardon of that seems to pardon the murder also.—S. P. and the appeal was held maintainable, and the woman was burnt. Jo. 425. pl. 10. Hill. 14 Car. B. R. Pigott, v. Pigott.—Cro. C 531. pl. 10. S. C. adjudged accordingly.—S. C. cited by Holt, Ch. J. accordingly, 6 Mod. 217. Trin. 3. Ann. B. R.

7. There were 3 brothers, and the *middle brother was killed*, the *eldest died within the year*, and no appeal brought, the question was whether the younger brother should have an appeal, it was not resolved. Dyer 69. pl. 31. Pasch. 5 E. 6. Bell v. Crakenhorpe. Staundf. Pl. C. 59. b. lib. 2. cap 8. says that in such case the appeal being once attached in the elder brother is now gone for ever.

8. If the *lord kills his villain* his son and heir shall have an appeal. [ 530 ] St. P. C. 60. a. (B) S. P. accordingly.  
Co. Litt. 139. b.

9. If there be no wife of the person killed, then *the next heir at the common law* shall have the appeal, if such heir be male, but if such heir be a female as daughter, &c. she shall not have it, nor in such case shall any heir male, and therefore the youngest son in Borough-English shall not have the appeal though he be inheritable to the land. St. P. C. 59. b. (F) cap. 8. Hale's Pl. C. 182. S. P.— Every such appellant must be heir general to the deceased by the course of the common law, unless the heir general had himself a share in the guilt in which case the next heir shall have appeal against him. 2 Hawk. Pl. C. 165. cap. 23. S. 40.—St. P. C. 60. a. (B) S. P. cites Fitzh. Corone 459.

10. If the *eldest son* after title of appeal accrued to him *disables himself*, as by *attainder of felony* or the like, so that by such disability he shall not have appeal, yet the 2d son shall not have it. St. P. C. 60. a. (A) cites Fitzh. Corone 235, and 322. and says that the law is the same if the disability be in the life of the ancestor who is killed, &c. 2 Hawk. Pl. C. 165. Cap. 23. S. 40. says that neither the eldest nor youngest son shall have it, the one by reason of the attainder, nor the other because he cannot be heir to his father while he has an elder Brother, who, though he be looked upon as dead in law to some purposes,

poses, yet in truth is alive, and capable of forfeiting all privileges belonging to the heir, though not of taking benefit from any of them, and cites Fitzh. Corone 235. but says that Fitzh. Corone 322. seems contrary.

\* [This was Hill. 13 H. 4. where the eldest brother was a monk professed, &c. And so a person dead in law.] —Hale's Pl. C. 183. says that a monk shall have no appeal neither of death or otherwise.—St. P. C. 60. a. (D) S. P. accordingly.

11. An *hermaphrodite*, if the male sex be predominant, shall have an appeal of death as heir, but if the female sex doth exceed the other, no appeal doth lie for her as heir. 2 Inst. 69.

Fitzh. Corone 385. cites Pasch. 15 R. 2.

12. *A. has a daughter, his heir apparent, this daughter has a son, she dies in her father's life-time, then A. is killed; this son shall have an appeal of the death of his grandfather; for by the death of his mother in his grandfather's life-time the son is the immediate heir to him. By all the serjeants in England. Jenk. 6. pl. 8.*

St. P. C. 60. a. (D) S. P.

13. An *idiot*, or one that is *mute*, shall have no appeal either of death or otherwise. Hale's Pl. C. 183.

Fitzh. Corone pl. 385. cites Pasch. 15 E. 2.

14. A man *above* 70 may appeal, but no battail waged. Hale's Pl. C. 183.

where the defendant pleaded not guilty, Prist to defend by his body, and flung his gauntlet into the court; whereupon it was insisted that he was of 70 years of age (and so see that battail lies against a man of such age) and the plaintiff imparled, &c. Scroop bid him refuse the gauntlet then, &c. and afterwards the plaintiff was nonsuited, &c.—St. P. C. 60. a. (D) cites S. C. & S. P. accordingly and yet such age shall oust the defendant of Gager of Battail, &c.

### (C) Appeal of Murder. Who shall have it. The Heir an Infant; and Proceedings in such Case.

\* S. P. Br. Appeal, pl. 116. cites M. 22 E. 3. & tit. Co-

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ron. 30.—

Raym. 483. it was said and [as it seems, per cur.] that before the 21 E. 3. 23. an infant could not bring an appeal, and that they find no precedent of an appeal brought before that time, but that now it is frequent.

† Br. Appeal, pl. 119. cites S. C. & 32 Aff. 8.

1. **I**N appeal, it appeared by inspection, that the plaintiff was within age, by which the \* *parol demurred*, and he was arraigned immediately of the same death, upon indictment, and was compelled to plead to it, and after was let to mainprise till the suit of the party was determined; and so see that no jury was sworn upon him immediately, but the plea recorded, quod nota. Br. Appeal, pl. 36. cites † 11 H. 4. 94. and H. 22 E. 3.

2. In appeal by an infant within age, the defendant prayed to be dismissed for the non-age, and the justices said that they would examine the matter, and if they thought that the appellant is guilty, he should remain in ward till the full age of the infant. Br. Appeal, pl. 105. cites 17 E. 4. 2.

Br. Coverture, pl. 2. cites S. C. An infant of the age 9 years was

3. Note per cur. that an infant may have appeal of murder, and it shall be by guardian, and not by attorney, and the appeal shall not stay till his full age, as heretofore. Br. Appeal, pl. 2. cites 27 H. 8. 11.

admitted per Guardianum, to sue an appeal for the murder of his brother. No. 461. pl. 646. Hill. 39 Eliz. Perry's case———Lat. 173. Hill. 2 Car. S. P. admitted———An infant may have appeal, but no battail waged, and adjudged of late times that the parol shall not demur. Hale's

Hale's Pl. C. 183. Sed Quære——2. Hawk. Pl. C. 161. cap. 23. S. 30. says that the infancy, old age, or the imbecillity of the plaintiff, is no good objection against his bringing an appeal, though the defendant loses the benefit of waging battail, and so puts him in a worse condition than if the appeal were brought by one capable of fighting; for since the defendant has proper means for his acquittal, by putting himself upon a trial by his country, and the imbecillity of the plaintiff is wholly owing to the act of God, and no ways lessens the injury complained of by him, it is not reasonable he should suffer any disadvantage from it. And agreeably hereto it seems settled of late times, contrary to the numerous authorities in the old books, that the parol shall not demur in an appeal for the nonage of the plaintiff; yet it is certain that an infant must prosecute such suit by guardian; but though the guardian be so necessary in the prosecution of such suit, yet if the infant comes into court, and says he will relinquish it, notwithstanding which the guardian will prosecute it, the court may in discretion discharge such guardian, and assign another, it not being reasonable that an infant be bound to continue a suit against his will, which demands nothing but revenge, and will be chargeable to him.

4. An infant by guardian brought appeal of the death of his brother against the lady Farmer, and afterwards upon composition made, he came into court, and disallowed his guardian, after which the appellee came into court, and pleaded her pardon and had it. 2 Roll. Rep. 59. Mich. 16 Jac. B. R. Onlie's case. S. C. cited Arg. Ld. Raym. Rep. 555 and ibid. 556. denied to be Law by Holt, Ch. J. Pasch. 12 W. 3. in case of the king v. Toler.

5. An infant cannot prosecute an appeal by *procchein amy*, though he may all other suits, but he can do it only by guardian, per Gould, J. Ld. Raym. Rep. 557. Pasch. 12 W. 3. in case of the King v. Toler.

6. A. an infant, as heir to B. sued an appeal of murder against T. and C. was admitted as *procchein amy* to A. At the day of the return the court was moved, that the sheriff might return the writ, who said that the infant with some relations required him to deliver the writ back to them, which he did, and that it was usual so to do, for an infant may disavow his guardian or his suit; but per Holt, Ch. J. both the writ and suit are subject to the direction of the guardian, and the infant can no more dispose of the writ than he can prosecute it, 'tis true, he may be nonsuited either before or after appearance, but then the appellee must be arraigned at the suit of the king; he may likewise disavow the suit, and then the court may discharge the guardian, but it is a contempt in the sheriff to deliver the writ back without any authority, and he was fined and committed, though the clerk in court offered to undertake for the fine. The reporter says he heard that the Chancery being moved for a new writ of appeal, it was denied upon a solemn hearing before Ld. Keeper Wright, the Master of the Rolls, \* Treby, Ch. J. Powell, J. and Ward, Ch. B. 1 Salk. 176. Pasch. 12 W. 3. B. R. Toler's case. 12 Mod. 372. Stout v. Towler, S. C. & S. P. accordingly, and says that the appellant was not mentioned in the writ to be an infant, but that after the teste, and before the return of the writ he chose the deceased mother for his guardian before Holt, Ch. at his chambers, and that she was reported by

there and then admitted, accordingly. And it was insisted in behalf of the sheriff as Salk, and also that the infant having no guardian at the time of the writ purchased it was not well sued out. But it was resolved if there needs no guardian till the writ is returnable, for the use of a guardian is to pursue it when it is before the court, and not as here to complain of the officer for not making a return, and that any body might sue out the writ for the infant, and that there is no body in law whose writ it is, before the return, but the infant's.

7. B. was indicted of murder at the Old Baily, and found guilty, but got the queen's pardon. An infant lodged an appeal in propria persona, 2 Ld. Raym. Rep. 1288, \* [532]

1289. S. C. & S. P. and see there the entry at large as perused, and approved by Holt Ch. J.

*persona*, before the justices of goal delivery the same sessions, which being removed by certiorari into B. R. it was moved to admit him by guardian, but denied as too late, because it *should have been by guardian at first*, and then have moved the same in B. R. But the court said that if the defendant *pleaded this in abatement*, the appellant might confess his plea, and commence a new appeal by bill; for a nonsuit is peremptory, but an abatement is not. Afterwards the appellee being at the bar, and the appellant in court, his counsel would have abated the writ, and brought a new appeal by bill, but the court refused it, for Holt said that this is not like the case of *WATTS v. BRAINS*, in Co. Ent. for there the writ was void, and the appellee refusing to plead the infancy in abatement, intending to take advantage thereof after trial, the court said they would abate the first appeal ex officio, and ordered an *entry that the appellant being in court, and it appearing by inspection that he is under age, (about 6 or 7 years old) ideo the court ex officio does abate the appeal*. And Holt Ch. J. said that if the appellant had not been in court, there must have been a writ to have brought him in to be inspected. Then the appellant brought another appeal by bill, and declared against him in custodia, and the appellee, being arraigned instanter, demurred to the appeal and pleaded not guilty. The court ordered the first appeal to be entered as the first day of that term, and that the pleading to the 2d should be entered instanter, that the demurrer might be first determined, and for that end made it a consilium to be argued in the next term. 11 Mod. 216. pl. 4. Pasch. 8 Ann. B. R. *Smith v. Bowen*.

### (D) Appeal of Mayhem, and how to be tried.

1. **A**PPEAL of mayhem against R. W. and others, R. and W. *pleaded not guilty, without praying that the mayhem be adjudged by the court, and the inquest prayed that they may see the party whether he be mayhemed or not, Thorpe granted it, but said that this is not de rigore juris, for it is at the election of the party whether he will shew it or not, and said that the party by his plea has accepted it to be a mayhem, and though he recovered damages now for the mayhem, he may at another time recover damages by writ of trespass for the battery. Br. Appeal, pl. 60. cites 22 Aff. 82.*

2. And so see that the appeal *meddles only with the mayhem, and not with the battery*; and the judgment was that the plaintiff recover damages, and that the defendant shall be taken; and because some pleaded and were attainted, and others did not come, and the plaintiff said that he would not proceed further against them, it was awarded that the plaintiff *should be taken*, for now it appears that his appeal is false against them, quod nota. Br. Appeal, pl. 60. cites 22 Aff. 82.

3. Appeal of mayhem, the defendant prayed that the court would

see

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And Grene  
anno 32 E.

see the stroke, and see whether he had mayhem or not. Birton said this they ought not to do, if the defendant does not put it in issue, and after the court saw the stroke, and could not judge of it because it was new, and after the *defendant gave it for issue, and prayed the court that the mayhem be examined, by which writ issued to the sheriff to make to come some of the best physicians and surgeons in London to inform our lord the king, and the court de iis quæ ex parte dicti domini regis injungerentur*, and note that the *defendant shall not have other answer*, for if the surgeons say that he is mayhemed, he shall be thereupon attainted. Br. Appeal, pl. 70. cites 28 Ass. 5.

3. adjudged the plea peremptory, when the defendant prayed that the stroke be examined. Ibid.—Br. Peremptory, pl. 33. cites S. C.—No doubt if the de-

fendant puts it in issue, and prays that it be viewed by the court, the court may take a view and then determine the matter, and if it be doubtful they may award a writ to the sheriff to return some able physicians and surgeons for their better information. But it seems that the court cannot proceed to such trials by the view unless the defendant prays it. 2 Hawk. Pl. C. 160. cap. 23. S. 27.

4. Appeal of mayhem, the defendant *said that it was no mayhem*, and prayed that it may be examined by *justices who saw it, and would not adjudge it* because the stroke was fresh, but took surety of peace of 4 mainpernors each in 40l. to the king, and *gave day of judgment till the stroke shall be cured*. And so see that their judgment is peremptory. Br. Appeal, pl. 135. cites 41 Ass. 27.

5. If the *defendant prays that the blow be viewed* to adjudge whether it be mayhem or not, there if it be adjudged mayhem by the court it is peremptory to the defendant, but the law was held contrary by those of Gray's Inn. Br. Appeal, pl. 86. cites 6 H. 7. 1. per Tremail.

Br. appeal, pl. 143. cites S. C. accordingly. 2 Hawk. Pl. C. 160.

cap. 23. S. 27. says it seems agreed that an adjudication made upon such view is peremptory and conclusive to each party.

6. Appeal of mayhem, the *defendant demanded the view of the mayhem*, which was *assigned in the shoulder of the plaintiff*, and was *ousted of the view because it is of his own wrong*. Br. Appeal, pl. 46. cites 21 H. 7. 33.

7. And if the *mayhem be adjudged by inspection of the court, or by a surgeon*, this is peremptory. Quod nota per cur. Ibid.

8. But if the justices, or those who saw it, be *in doubt whether it be a mayhem or not*, they may refuse the examination, and *compel the party to put it to the country*. Br. Appeal, pl. 47. cites 21 H. 7. 40.

It seems that they are not bound to try it by their view,

but may order a trial by a jury, at which, it is said that they may, if they think fit, order that the jury shall have a view of the wound. 2 Hawk. 160. cap. 23. S. 27.

9. A person maimed shall not have appeal. St. P. C. 60. a. (D) cites Fitzh. Corone 322. but says quære; for a distinction must be made where the plaintiff was *maimed by the defendant, or by some other person*.

2 Hawk. Pl. C. 160. cap. 23. S. 28. says it seems to be holden that the

defendant in appeal of mayhem may in some cases wage battail; but the serjeant says he finds no instance in which battail hath been actually waged in such an appeal.

says he finds

10. In an appeal of mayhem the defendant *pleaded that the same plaintiff had brought trespass of battery, and recovered damages in*

4. Rep. 43. a. pl. 7. S. C. resolved ac-



accordingly, though it was objected that an appeal of maihem

that action, and averred that the battery and trespass is the same mayhem on which the appeal is brought. And adjudged upon argument, that it is a sufficient bar. Mo. 268. pl. 419. Mich. 30 & 31 Eliz. Hudson v. Lee.

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was an action of a higher nature than an action of trespass; for inasmuch as in appeal he shall recover damages only, and he has already recovered damages in the action of trespass, it was for that reason resolved that the bar was good.——Le. 318. pl. 447. S. C. accordingly.——2 Hawk. Pl. C. 159. cap. 23.

f. 22. cites S. C. accordingly; for it shall be intended that the jury in giving damages for the wounding included the maihem, and no man shall be liable to double vexation for one and the same thing; but if in such case the appellee shall make it appear by a special replication that the maihem has been occasioned since the verdict in the action of trespass by some subsequent mortification, dryness, or shrinking of the part by reason of the wound, perhaps he may avoid such plea by such special matter; but the court will not intend it unless it be specially shewn.——And see S. P. Le. 319. in the S. C.

Mo. 457. pl. 628. Kirton v. Hopton, S. C. adjudged accordingly.——Noy 36. S. C. adjudged that the plea is naught.——Ow. 59. S. C. and a diversity

11. In appeal of maihem against several defendants, one of them pleaded that there was no such person as one of the appellees, & quoad the felony Not guilty. Another pleaded misnomer, and to the felony Not guilty. This was held ill per tot. cur. For a plea in abatement, and also Not guilty, is not good in any case but where the life is in jeopardy, and that in favorem vitæ; whereas this is only an action in nature of trespass; and the court awarded that the pleas in abatement be ousted, and the pleas of Not guilty should only stand. Cro. E. 495. pl. 14. Mich. 38 & 39 Eliz. B. R. Kirton v. Williams & al'.

taken between such pleading in appeal of mayhem and that of murder, that in the last case he must of necessity plead over to the murder; or otherwise if he will join in demurrer upon the plea to the writ, he thereupon confesses the felony, and so must plead over Not guilty; but otherwise in maihem; for though the declaration be for felony, yet a maihem is only a trespass, and all are principals, and the defendant's life not in question, but shall render damages only, and therefore the pleading over to the felony is a waiver of the plea; and this diversity was agreed to by Popham, Fenner, and Gawdy clearly.——Poph. 115. Kirton v. Hopton, S. C. and held accordingly.

## (E) Appeal of Rape. Who shall have it. And Pleadings.

1. IF a man be outlawed of ravishment of a feme, or convicted at the suit of the party, this is not felony; per Ald. Quere inde; for by the statute of Westm. 2. cap. 34. he shall have judgment of life and of member; and it seems that the opinion of Ald. is that no appeal is here given, but that the king only shall have the suit. Br. Corone, pl. 168. cites 13 E. 3.

This statute gave an appeal where no appeal

2. In an appeal of rape the husband, father, or next of the blood, shall have the suit, and the defendant shall not be received to wage battle.

lay before, and also to other persons, so as the woman that never consented may have her appeal upon this statute, and if she consents afterwards then the appeal is given, as in this statute 2 Inst. 434.

In appeal of rape of his feme the defendant pleaded ne unquam accouple in lawful matrimony, because one was assid to the feme, and after another married her, and after she came to him who assid her, and he married her, and she after is ravished. The first who married her shall have the appeal of rape; for the first espousals are good till they are divorced by the pre-contract, and the opinion



opinion here is that *Ne unques accouple, &c.* in this case is no good plea; for the statute gives it to the barons si viros habuerint; so that *baron in possession shall have it*, where espousals are not void. Br. Appeal, pl. 32. cites 11 H. 4. 13.

This statute as to the husband shall be construed strictly, and be intended of a husband in possession, though there be good cause of divorce; for he is her husband till a divorce be had. Contra where the marriage is void; for there he is not vir ejus, and therefore in that case *Ne unques accouple, &c.* is no plea by the best opinion, though contra in appeal of the death of the husband, or in demand of dower, because they are by the common law. Br. Parliament, pl. 89. cites 11 H. 4. 14. — 2 Hawk. Pl. C. 173. cap. 23. f. 62. says that *Ne unques accouple, &c.* is a good plea, and shall be tried by the bishop's certificate, who, if the marriage were unlawful by reason of a pre-contract, ought to certify against the appellant.

If a woman be ravished by her next of kin, and consents to him, and has neither husband nor father, the next of kin to him shall have the appeal; for he has disabled himself by the rape, whereby he becomes a felon. 2 Inst. 434. — Hale's Hist. Pl. C. 632. S. P. cites 28 H. 6. Corone 459. — 2 Hawk. Pl. C. 173. cap. 23. S. 64. S. P.

If there be no husband, nor father, then the appeal is given to the heir, whether male or female. Hale's Pl. C. 186.

3. A feme, prisoner in the Marshalsea, made suggestion that the servant of the marshal had ravished her in prison; and Gascoigne commanded the marshal to take the battoon from him, till it was discussed if he was guilty or not, and commit him to prison in ward, quousque, &c. And per cur. because she was covert de baron, she cannot bring the appeal without the baron; but if the baron will, they may pursue. And see appeal by baron and feme. Br. Rape, pl. 1. cites 8 H. 4. 21.

But ibid. cites 1 H. 6. 1. and 11 H. 4. 12. and 10 H. 4. Fitzh. Tit. Corone. \* 128. [but this is misprinted, and should be

\* 228. that it may be brought by the feme alone.]

4. In appeal of rape the count was, that the defendant had ravished his wife contra formam statuti 6 R. 2. &c. Exception was taken for not alleging that the feme did consent to the ravisher; for if she did not consent, appeal is not given on this statute; but it was answered that this is implied in the words (contra formam statuti.) St. P. C. 81. a. (C) cites Mich. 11 H. 4. 12.

Fitzh. Corone, pl. 86. cites Mich. 11 H. 4. 13. S. C. & S. P. accordingly. — 2 Hawk.

Pl. C. 173. cap. 23. f. 63. S. P. accordingly.

5. In appeal of rape the defendant demanded judgment of the writ, because there is not felonice rapuit in the writ, and as to the felony Not guilty. Thel. Dig. 216. lib. 15. cap. 5. f. 19. cites 1 H. 6. 1.

6. Baron and feme may join in appeal of rape of the feme; for he cannot have it without his feme; per cur. Br. Baron and Feme, pl. 34. cites 8 H. 6. 21.

And see elsewhere the baron brought

appeal alone. 1 H. 6. 1. and 4 H. 6. 13. and 10 H. 4. Fitzh. Corone 128.

7. W. brought appeal of rape of J. his wife against 2, and the writ was *Ad respondendum querenti secundum formam statuti 6 R. 2. cap. 6. Quare uxorem rapuit unde eum appellat*; and exception was taken that the writ should be *Unde eum appellat secundum formam statuti*, and not *Ad respondendum secundum formam statuti*; for the statute does not give the answering, but the answering is by the common law. And by Hales J. the appeal of rape is given by the stat. W. 2. whereupon the defendant passed over, and exception was taken to the writ, because it did not say that *felonice rapuit, &c.* & adjournatur. Br. Rape, pl. 4. Wm. Acton's case.

Fitzh. Corone, pl. 228. cites Mich. 10 H. 4. S. P. and the defendant was ordered to answer and so he did, and pleaded *Ne unques accouple &c.* —

Fitzh. Corone, pl. 1. cites M. 1 H. 6. 1. S. P. of *Ad respondendum*, and the same exception taken

taken; and Hal. said that the statute does not give the appeal; for that was at the common law; but he shall answer according to the statute, because the statute says that he shall not be received to wage battail, and so the writ good; whereupon the other exception was taken and afterwards pleaded Not guilty to the felony; and Fitzherbert thinks the reason was, because the felony is implied in this word (*rapuit*;) and therefore the writ good.

Hale's Hist. Pl. C. 633. says the appeal must be speedily prosecuted; 8. Though by the stat. W. 1. cap. 13. whereby rape was turned into trespass, 40 days are limited for the suit, yet it being made felony again by the stat. W. 2. cap. [34.] and no time limited for it, it may be *brought in any reasonable time*. Hale's Pl. C. 186.

for it seems that a year and a day is not allowed in this appeal, but some short time, though it be not defined in law what time, but lies much in the discretion of the court upon the circumstances of the fact, yet the stat. W. 1. allowed only 40 days, and long

[ 536 ] delay of prosecution in such case of rape, always carries a presumption of a malicious prosecution.——2 Hawk. Pl. C. 175. cap. 23. S. 72. says, it seems that at this day it may be brought in any reasonable time, and lies in the discretion of the court; that the stat. Westm. 1. which turned this offence into a trespass, limited 40 days; and the stat. Glouc. cap. 9. which limits appeals to a year and a day, extends only to appeals of death; and West. 2. cap. 34. which makes rape a felony again, limits no time for the bringing of it, but leaves it to the construction of law, which shall be agreeable to the ancient rules of law, in such points wherein the statute is silent.

St. P. C. 61. b. at the bottom, and 62. a. S. P. cites Fitzh. Corone 17. where it is said that she shall not have appeal of rape against him; but the king shall punish it by way of indictment. 9. If the *lord* had *ravished his niece* or bond-woman, she might have had an appeal of rape against him before the conquest, as at this day she may. 2 Inst. 181.

10. In the appeal of rape being the suit of the party, the king's *pardon* does not discharge the party as it does upon an indictment at the suit of the king. 2 Inst. 434.

11. In an appeal of rape by virtue of the statute of Westm. 2. cap. 34. several exceptions were taken, (*viz.*) that the appellant had counted, that on such a day, year, and parish, the appellee *cam rapuit & carnaliter cognovit*, without saying *felonice*, and she did *not aver it in fact that she did not consent either before or after the fact done*, according to the statute of W. 2. cap. 34. and also because in the conclusion of the count it is *not supposed to be contra formam statuti*, &c. but no resolution was made to these questions, the queen pardoning the offender. D. 201. b. pl. 67, 68. Trin. 3 Eliz. Ellen Lamb's case.

(F) Appeal of Robbery, Larceny, &c. Who shall have it. And against whom.

1. A Man may have an appeal of robbery *for the king or queen*, as of a cup of theirs stolen. St. P. C. 61. a. cap. 9. cites H. 17 E. 3. 13.

But Brooke says it is said, that at

2. It is agreed to be a common use, that *churchwardens* shall have appeal of goods or ornaments of a church; *quod nota*; and this

this *de bonis ecclesie in custod sua existentibus*. Br. Appeal, pl. 31. this day it is  
cites 11 H. 4. 11. used to be ,  
De bonis pa-

*robiorum* in custodia sua existentibus. Br. Appeal, pl. 31. cites 11 H. 4. 11. —S. P. and  
the churchwardens for the time being shall have the appeal of robbery. Br. Appeal, pl. 45.  
cites 37 H. 6. 30. 31. —2 Hawk. Pl. C. 167. cap. 23. S. 44 says it seems agreed, that  
churchwardens having possession of the goods of the church may have an appeal of larceny  
against any one who shall steal them; for they have a special kind of property in them  
against all strangers.

3. In appeal of robbery, if the defendant says that the plaintiff is his *villein*, this is a good plea. Br. Nonability, pl. 44. cites 11  
H. 4. 93. Thel. Dig.  
216. lib. 15.  
cap. 5. S. 18.  
cites 18 E.

3. the which is reported 11 H. 6. 23. [but it should be 93.] and Mich. 9 H. 4. 1. —Hale's  
Pl. C. 184. S. P. accordingly. —2 Hawk. Pl. C. 167. cap. 23. f. 44 says, it is certain that a vil-  
lain cannot have appeal of larceny against his lord for any of his goods taken by his lord, because  
the lord by seising them makes them his own; but it seems clear at this day, that  
any tenant who is not a villain may have appeal of larceny against his lord. — [ 537 ]  
Lat. 127. S. P. accordingly by Doderidge J. to which Jones J. agreed.

4. In trespass, if *my servant has my goods in possession, and be thereof robbed*, he shall have thereof appeal, per Littleton; *Quod fuit concessum*; for he is *chargeable over* to his master, and the same appears there of a bailiff. Br. Appeal, pl. 91. cites 2 E.  
4. 15. St. P. C. 60.  
b. (F) S. P.  
according-  
ly, cites  
Fitzh. Co-  
rone, pl.  
100.

[which cites Mich. 45 E. 3. 17. where S. P. seems admitted.] —2 Hawk. Pl. C. 167. cap.  
23. f. 44. S. P. and says it seems agreed. —Either master or servant may have appeal in  
such case. Hale's Pl. C. 184. —S. P. accordingly, 2 Hawk. Pl. C. 167. S. 45. and in such  
case he that first commences the appeal shall prevent the other.

5. Note, per Littleton J. that the opinion of the justices was, that if a man *takes my goods feloniously*, and *another takes them from him feloniously*, I shall have appeal of the 2d. taking; for by the first taking the property was never out of me, for a \* felon cannot claim property, and e contra it is said elsewhere of a trespassor. Br. Appeal, pl. 100. cites 13 E. 4. 6. \* S. P. Br.  
Appeal. pl.  
84. cites 4.  
H. 7. 5. —  
2 Hawk.  
Pl. C. 167.  
cap. 23. S.  
44. says it is

said that a person who has been robbed of his goods, still continues to have so far the possession as well as the property of them, that he may bring an appeal of larceny against any one who shall steal them from the robber. —Hale's Pl. C. 184. S. P. accordingly. —S. P. 2 Hawk. Pl. C. 167. S. 45. says, that such taker of the goods claiming no property in them, but taking them only as a felon, had in judgment of law neither any property nor possession in them, but the same wholly continued in the first person; but if the goods had been taken from him by a trespassor under pretence of some title, and such trespassor had been robbed of them it seems the first person could have no appeal for them. —St. P. C. 61. a. cap. 9. S. P. and same diversity accordingly cites Mich. 13 E. 4. 3. and Fitzh. Corone 62. —Br. Appeal, pl. 100. cites 13 E. 4. 6. S. P. and same diversity.

6. Brooke makes a quære, if the *bailee of goods* who is robbed by a stranger cannot have appeal specially *De bonis in custodia sua existentibus*; for he may have trespass or replevin *de bonis in custodia sua existentibus*. Br. Corone, pl. 141. cites 5 H. 7. 18. 2 Hawk.  
Pl. C. 167.  
cap. 23. f.  
44. says it  
seems

agreed, that  
a carrier to whom goods are delivered to be carried to a certain place, or in general, any person whatsoever, who is so far intrusted with the goods of another, as, in judgment of law, to have the possession, and not the bare charge of them, may have an appeal of larceny against any one that shall steal them, because they have a special kind of property in them against all strangers; and it seems that they may bring a general appeal as for their own goods, or a special one for the goods of J. S. in their custody. But it seems clear, that no one can maintain such appeal who has the bare charge of goods, as a *butler* or *cook*, who in my house have the charge of my goods, because in such case the whole possession, as well as the absolute property in judgment of law, always continues in me.

Hale's Pl. C. 184. S. P. according-ly.— 7. If *two are merchants in common, and one of them is robbed and killed, the other shall have appeal of this robbery.* St. P. C. 61. a. cap. 9. cites Fitzh. Corone, 392. [8 E. 3. Itin. Canc.]  
2 Hawk. Pl. C. 167. cap. 23. f. 45. S. P. accordingly.

8. If a thief steals goods out of the custody of a *taylor* which he has of a customer, the taylor shall have a general appeal; per Frowike Ch. J. clearly. Kelw. 70. pl. 7. Mich. 21 H. 7. Anon.

\* S. P. accordingly. Hale's Pl. C. 184.— 9. An *executor* may have an appeal of robbery done to himself, \* but *not* of a robbery done to his testator. St. P. C. 60. b. (f)

2 Hawk. Pl. C. 167. cap. 23. f. 45. S. P. accordingly, because when the larceny was committed, it was no injury to the executor, but to the testator only; and therefore the appeal for it being only a mere personal action, and vested wholly in the testator, there is no doubt but that it dies with him, as all other actions for mere torts do.

[ 538 ] 11. Appeal of felony lies against a *monk professed* without his sovereign, St. P. C. 62. a. (A) cap. 11. cites Fitzh. Corone 17. [Trin. 29 H. 6.] and Trin. 6 H. 7. 5.

Hale's Pl. C. 185. S. P. accordingly.— If appeal be brought against an abbot and his commoign, the commoign shall answer and plead by himself without his sovereign. Br. Appeal, pl. 50. cites 15 E. 4. 1.

12. In appeal of robbery against two accessories brought in the county of *W.* where the robbery was done, the plaintiff set forth, that the principals named in the writ, and who were attainted, did the robbery in the county of *W.* and that the defendants before the robbery did feloniously abet them in London; it was adjudged, that though the plaintiff could have only one appeal against the principals and accessories, and that this must necessarily be brought against the principals in the county of *W.* yet because those of the county of *W.* and London upon Not guilty pleaded cannot join, and those of *W.* cannot inquire of a thing in London, the appeal against the said accessories shall abate. 7 Rep. 2. b. cites D. 38. Mich. 29 H. 8. Gawyn v. Hufley and Gibbs.

Hale's Pl. C. 184. S. P. 13. An *infant* shall have an appeal of robbery. St. P. C. 60. b. cap. 9.

S. P. whether it be appeal of robbery, or any other appeal. 14. Appeal of felony lies against a *feme covert* without her baron. St. Pl. C. 62. a. (A) cap. 11.

15. So it lies against an *infant*; and so of all others who may commit felony. St. Pl. C. 62. a. (A) cap. 11.

Hale's Pl. C. 185. and the same of an infant. Ibid.— 2 Hawk. Pl. C. 168. cap. 23. S. 46. S. P. accordingly, both as to infant and feme covert.

St. P. C. 60. b. cap. 9. 16. A *woman* at this day may have an appeal of robbery, &c. For she is not restrained thereof. 2 Inst. 68.  
S. P. accordingly, cites Fitzh. Corone 357.—Hale's Pl. C. 184. S. P.

## (G) At what Time Appeal lies.

1. Stat. Glouc. 6  
E. 1. cap. 9.

**E**Nacts, That *appeal shall not be abated for default of fresh suit, if the party shall sue within the year and the day after the deed done.*

These words of the statute are general; not making mention of

appeal of death any more than of other felony; but on comparing them with the other words in this statute a man will intend them specially, and that they extend only to appeal of death, and to no other appeal; and yet it seems that in the time of E. 3. the judges intended them generally, viz. that they extended to all appeals. St. Pl. C. 62. a. (B) cap. 12. cites Fitzh. Corone 184. where he says it appears that appeal of robbery ought to be commenced within the year and day after the fact, and that Britton 45 & 46. is to too; but says that the law is not so at this day; for if one being robbed makes *fresh suit*, though he does not commence his appeal within 2 or 3 years after the robbery, yet it is well enough, as appears Pasch. 7 H. 4. 38. — S. P. accordingly, and the judging of fresh suit lies in the discretion of the court. Hale's Pl. C. 185. — 2 Hawk. Pl. C. 168. cap. 23. s. 48. S. P. accordingly; but says that it seems that one who has been guilty of a gross neglect in pursuing the offender, may be barred of such appeal as well within the year and day as after; for that the common law seems in all appeals to have required that the appellant make fresh suit; and the stat. of Glouc. which takes away the necessity of it in appeals of death brought within the year and day, extends not to other appeals.

2. The *suit is fresh enough* if the diligence of the party be done, notwithstanding the robber *be not taken in a year after, and be taken by another.* Br. Appeal, pl. 23. cites 7 H. 4. 43.

3. In appeal of death, *after declaration the plaintiff was nonsuited, and the defendant was arraigned upon the declaration, and said that of the same death he was indicted before and arraigned, and pleaded pardon of the king, which was allowed to him, and went without day; judgment, &c. and he shewed the charter, and it was allowed again; quod nota.* And so see that the plaintiff had appeal *after the arraignment at the suit of the king*, and the defendant was twice arraigned. Quod nota. Br. Appeal, pl. 33. cites 11 H. 4. 41.

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4. *After the year and the day appeal of death does not lie; per Hank.* And hence it seems that other appeals of *larceney* lie well. Br. Appeal, pl. 37. cites 12 H. 4. 3.

5. Where the writ of appeal of death of his ancestor *was brought within the year, and before the return the year was passed, and the king died, and yet upon certiorari to bring in the writ the plaintiff shall have re-attachment after the year.* Br. Appeal, pl. 98. cites 10 E. 4. 13. 14.

Br. Re-attachment, pl. 27. cites S. C. — Fitzh. Re-attachment, pl. 8. cites

S. C. accordingly, and says that the justices commanded a note of the re-attachment to be made and shewn to them, and that the writ of appeal was entered of record in bank before it issued to the sheriff.

Appeal of death was *abated by demise of the king, and the defendant came and shewed pardon of the king, and that the year was passed, and prayed the pardon to be allowed; and by the justices of both benches, the re-attachment ought to have been within the year after the death of the king, and because not, &c. therefore the pardon was allowed, and the defendant went quit.* Br. Appeal, pl. 81. cites 2 H. 7. 10.

In appeal of death, (since the statute, 1 E. 6. cap. 7.) if the writ be delivered to the sheriff within the year, and before the return thereof, or that the sheriff has done any thing, the king dies, and the year expires before the return day, in this case the common law will give remedy to the plaintiff, viz. a certiorari returnable in B. R. and thereupon the plaintiff shall have *re-attachment*, though it comes not in by the return of the sheriff, but by certiorari, and this is by reason of the necessity of the



the matter ; for otherwise the plaintiff who lawfully purchased his writ within the year, without any default in him, will lose his appeal, the year and day being now past ; and therefore, since by *act in law* the writ is discontinued, the law will give means to revive it, that the party may not be without remedy. 7 Rep. 30. a. b. Trin. 1. Jac. Discontinuance of process, &c. by death of the queen.

2 Hawk. Pl. C. 163. cap. 23. S. 33. says, that if an appeal had been abated by the demise of the king before 1 E. 6. cap. 7. (by which this mischief is provided against) it seems clear that the appellant might have sued a re-attachment against the appellee within the year and day after such demise, because he was in no default, and otherwise would have been without remedy.

At common law if A. had been arraigned for murder or robbery, though within the year, yet if appeal was

6. 3 H. 7. cap. 1. parag. 16. *If the felons and accessories in murder be acquitted, or the principal of the felony, or any of them, attainted, the wife or next heirs to him so slain may have their appeal within the year and day after the murder done against the said persons so acquitted, and all their accessaries, or against the accessaries of the principal, or any of them so attainted, or against the said principals attainted, and the benefit of the clergy not bad.*

after brought for the same crime, autrefoits acquit upon the indictment had been a good bar to the appeal. 2 Hale's Hist. Pl. C. 249. cites 16 E. 4. 11. a. and therefore the justices at common law would rarely arraign a prisoner upon an indictment especially for murder within the year after the death, in favour of the appeal. Ibid. cites 22 E. 4. Corone 44. Unless the appellant had been an infant, cites 32 H. 6. Corone 278, 279. Or the evidence had been very pregnant, and cites 21 H. 6. 28. b.

2 Inst. 320. cites this opinion of Staundford; but says that the year and day shall be accounted from the death; for before such

7. If a stroke be given on one day, and the person dies on another day, it seems the appeal shall be commenced within the year after the stroke given, because the death ensuing shall have relation thereto, &c. and the word (*deed*) in the statute shall be intended the felony whereon the appeal is commenced; for if one be accessory a year after the homicide or murder committed, appeal lies against him, and yet it is not within the year and day after the homicide or murder committed. St. P. C. 63. a. (A) (B).

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time no felony was committed, and that thus it has been often resolved and adjudged, and the reason grounded upon relation, which is a fiction in law, holds not in this case. And if an appeal of murder be brought, and hanging the suit, and after the year and day is run out one becomes accessory to the appellee, the plaintiff shall have an appeal against him after the year and day past after the death; but it must be brought within the year and day after this new felony as accessory, because in this case (*after the deed*) is understood after this new felony done as accessory.—— 3 Inst. 53. S. P. accordingly, if the stroke be given the 1st of January the year shall end the 1st of December.

If a stroke be given the 1st of Jan. and the party dies the 1st of March following, the day and year for bringing the appeal is to be accounted from the death, and not from the stroke, contrary to the opinion of Stamford's Pl. C. 63. a.—— Hale's Hist. of Pl. C. 427. cap. 33. cites Co. Pl. C. 53. and [ 2 Inst. 320. ] upon the stat. Glouc. cap. 9. and 4 Rep. 42. b. Heydon's case.—— 2 Hawk. Pl. C. 162. cap. 23. s. 33. says it has been holden that the computation shall be from the wound given, and not from the death, and that this opinion seems somewhat favoured by the letter of the statute, viz. That the party shall sue within the year and day after the deed done; but no deed is done at the time of the death, but at the time of the wound; yet the contrary is settled to be law, and is certainly most agreeable to the intent of the statute; the plain import whereof seems to be, That the appellant shall not be adjudged to have made default of fresh suit, unless he has been negligent a year and a day; but negligent he could not be, as to the bringing an appeal before the party was actually dead, because till then no appeal lay. And agreeable hereto it seems also to be settled, that if a person becomes accessory after the death by receiving the offender, an appeal lies against him at any time within the year and day after such receipt, because till then the appellant could not possibly be guilty of any negligence as to the bringing an appeal against the receiver.—— And ibid. s. 34. says it seems that in any of the cases abovementioned, the year and day are to be computed from the beginning of the day on which the death or receipt, &c. happened, and not from the precise minute or hour, because regularly the law makes no fraction of a day, and therefore if the party dies at any time the 1st of January, the year shall end the 1st day of January following.



8. An appeal of *robbery* may be brought by the party robbed 20 years after the offence committed, and that he shall not be bound to bring it within a year and a day, as he must do in an appeal of murder. Agreed by the justices. 4 Le. 16. pl. 58. Trin. 26 Eliz. B. R. Doyle's case.

But then there must be fresh suit. St. Pl. C. 62. b. lib. 2. cap. 12.

9. An appeal of *rape, robbery, felony, or murder* is brought, and pending this appeal the appellee is indicted at the suit of the king. The prosecution upon this indictment shall be stayed until the appeal is determined; for otherwise the king should destroy the suit of the party; for this reason the king by his pardon cannot bar an appeal. Rex, quod est injustum, facere non potest, by all the judges of England. Jenk. 160. pl. 4.

The case of other appeals than of murder, as of robbery, rape, &c. are not within the the statute 3 H. 7.

cap. 1. and therefore auterfoits acquit, upon an indictment within the year, stands as at common law a good bar to an appeal of robbery, or any offence other than murder or manslaughter; and yet the judges at this day never forbear to proceed upon an indictment of robbery, rape, or other offence, though within the year, because appeals of robbery especially are very rare, and of little use, since the statute of 21 H. 8. cap. 11. gives restitution to the prosecutor as effectually as upon an appeal. 2 Hale's Hist. Pl. C. 250.

10. A person indicted of murder was acquitted, and afterwards an appeal was brought, and this by direction of Holt, Ch. J. before whom the trial on the indictment was, the jury acquitted him against evidence, and the appellee being found guilty on the appeal was hanged. 11 Mod. 217. pl. 5. Pasch. 8 Ann. and ibid. 228. pl. 2, Trin. 8 Ann. Young v. Slaughterford.

## (H) Before whom it lies. And How.

1. IF the justices in Eyre are in a county, and one will commence appeal in B. R. for matter done in the same county where the justices in Eyre are, it seems that the appeal is well commenced, because the king has determined the power of the justices in Eyre as to this suit; \* but if the appeal be commenced before the justices, if he will bring other appeal afterwards in B. R. it will be a good plea to say that he has other appeal pending, because it is not reasonable that the party by his own act shall change the appeal once well commenced. Kelw. 152. b. pl. 4. 6 E. 1.

2 Hawk. Pl. C. 156. cap. 23. f. 5. S. P. but says, he supposes it must be intended of an appeal by bill, because all writs of

appeal must be returnable in B. R.

2. Appeal was brought before the justices at Newgate of robbery, &c. and so note that appeal lies well before the \* justices of gaol-delivery, and so it is often used. Quod nota. Br. Appeal, pl. 51. cites 4 Ass. 1.

\* [541] \* S. P. Br. Appeal, pl. 123. cites 11 E. 3. 28.

3. Appeal may be taken before the sheriff and coroner by bill. Br. Appeal, pl. 56. cites 17 Ass. 5.

And Scot J. said that sheriffs and

coroners may receive appeals, but he did not say that they may determine the appeals. Br. appeal, pl. 56. cites 17 Ass. 5. — Br. Corone, pl. 82. cites S. C. and S. P. — It seems here that the coroner may finish appeals taken before himself if the plaintiff be not nonsuited. Br. Appeal, pl. 62. cites 22 Ass. 97.

Upon the statute Magna Charta cap. 17. Britton and divers have been of opinion that upon appeal commenced before the sheriff and coroner, though they might award process against the appellee till exigent, yet they cannot award the exigent nor put him to answer if he appears, but can

can only award him to prison by this statute; therefore quære, for Britton and the book of assise which are contrary, wrote long after the making the said statute. St. P. C. 64. a. (A)—Hale's Pl. C. 171. the coroner together with the sheriff hath power in the county to receive appeals of robbery and other felonies, but then it must be of a felony in the same county; and upon this appeal they may grant process till outlawry, but it seems they cannot *send an exigent*, because prohibited by Magna Charta cap. 17.—Ibid. 179. Appeals may be prosecuted by bill before sheriff and coroner.—2 Hawk. Pl. C. 51. cap. 9. f. 41. says it seems probable that before the statute Mag. Chart. cap. 17. coroners might try offenders as well as receive accusations against them, but it is agreed that since the statute they cannot; and it is agreed that process may be awarded in the county court on such appeals till the exigent, but it seems questionable whether such process may properly be said to be awarded by the sheriff and coroner jointly, since the coroner being (as he supposes) the only judge, it seems most proper that the process be awarded by him only; neither doth it seem clear that the abovementioned statute restrains the coroner from awarding an exigent, and outlawing the appellee thereupon; for since, as it is agreed by all, an offender might become attainted by an abjuration of a felony made before a coroner, why not as well by an outlawry pronounced by him? and accordingly we find it taken for granted in some of the old books of the best authority, since this statute that appellees may be outlawed for not appearing on process before the coroner.—2 Hawk. Pl. C. 156. cap. 23. f. 10. says it is certain that an appeal may be commenced before the sheriff and coroner by bill, and removed from them into B. R. by certiorari, as is more fully shewn. Ibid. cap. 9. f. 39. 40. 41.—Hale's P. C. 179. S. P.

† S. P. Br. Appeal, pl. 62. cites a reading in the time of the same king. 4. So before the king \* in B. R. by bill, and so it was, quod nota, that sheriff and coroners may take appeal by the statute, *Westminster, 1. cap. 10. and by some they † determine it, but may award process till the exigent*, and such like in Antiqua Lectura in the time of H. 7. and it seems to be law. Ibid.

\* St. P. C. 64. b. (D) S. P.

Justices of gaol delivery shall not take appeals unless against those persons who 5. Appeal was brought before the justices of gaol delivery in their circuit at Windsor, by the statute which wills that justices of gaol delivery have power to make process of felony, and to determine it throughout England, and make process to the sheriffs, quod nota. Br. Appeal, pl. 11. cites 44 E. 3. 44.

are in the gaol before them, and not against those who are at large; for their authority is to deliver the gaol. Br. Appeal, pl. 19. cites 7 H. 4. 27.

But it is usual that if others are indicted, and taken after their coming they arraign them upon indictments, contra upon appeal, as appears there. Ibid.

If one be in prison for felony in B. R. or before justices of gaol delivery, and after is let to bail, yet appeal by bill lies against him notwithstanding this bailment. St. P. C. 64. b. 65. a. cites M. 21 H. 7. 35. and Mich. 38 H. 6. 4. and Fitzh. Mainprise, 12. But that against one let at large by mainprise, a man shall not have appeal, because he is not in ward. St. P. C. 65. a. cites Pakh. 9 E. 4. 2. and Mich. 39 H. 6. 29.—Hale's Pl. C. 179. S. P. accordingly.—2 Hawk. Pl. C. 155. cap. 23. f. 4. S. P. accordingly.

Appeal by bill may be commenced before justices of gaol delivery, but then the appellee, at the time of the appeal taken against him, must be a prisoner in the same gaol, whereof the justices are to make delivery; or one of the appellees at least must be so at the time of the appeal taken against him, and the others, or otherwise the appeal is not good. St. P. C. 64. b. (C) cites 13 H. 4. 12. and Trin. 9 H. 4. 2. But an approver may appeal others who are not in prison but at large, but this is by the statute De Appellatis.

As if one subject kills another subject in 6. 1 H. 4. cap 14. All appeals of things done within the realm, shall be tried by the laws thereof; and of those done out of the realm, by the constable and marshal of England for the time being.

a foreign kingdom, the wife of him that is killed may have appeal here before the constable and marshal. St. P. C. 65. a. (B.)—Ibid. says that some have said upon this statute that if one be struck in France, and dies thereof in England, no appeal lies thereof unless the parties were there in the service of the king; Quære de ceo.

Petition was made to the queen to make a constable and marshal, but she would not. Hutt. 3. cites 26 Eliz. Doughty's case.—So in Sir Francis Drake's case, Co. Litt. 74. b.—2 Hawk. Pl. C. 157. cap. 23. f. 12. S. P. accordingly, and says they shall proceed according to the civil law, and give sentence by testimony of witnesses or combat, and also that it seems clear, that no such appeal can be prosecuted before the marshal alone without the constable.—And ibid. f. 13. says, it has been holden, that if a man dies in England of a wound given him in a foreign realm, he may be

he appealed by the intent of this statute, before the constable and marshal, for that it is certain, that he cannot be tried by the common law; and it cannot be thought the meaning of this statute in restraining the civil law, in cases within the consueance of the common law to restrain also in cases which the common law had nothing to do with, and which were properly cognisable by the civil law, and by that only; for the only end of such a construction would be to cause a failure of justice.

7. Note by all the justices, that *justices of peace* cannot take appeal of any approver, nor of another, for their commission does not extend so far. Br. Appeal, pl. 18. cites 2 H. 4. 19. St. P. C. 65. a. (A) says it appears Hill. 44 E. 3. 95. that an appeal may be commenced before justices of peace; because they have power by their commission to hear and determine felonies; but Staundford says, *Quere tamen*. Hale's Pl. C. 179. S. P. cites 44 E. 3. Corone 95. Quod quere.

It seemed to Fitzherbert, in abridging of the case of 44 E. 3. that *justices of peace* having power by the statute of 34 E. 3. which there is called (16 novel statute) might receive an appeal by bill, because they had power to hear and determine felonies at the suit of the king, and the book at large speaketh only of justices of gaol delivery. 2 Inst. 420.——2 Hawk. Pl. C. 156. cap. 23. f. 9. says that Fitzherbert seemed of such opinion by virtue of the statute of 34 E. 3. 1. which enacts that justices of peace shall hear and determine all manner of felonies, and trespasses in the same country, &c. but that there is much greater authority for the contrary opinion; and that the case in the Year-book, in the abridgment whereof the said opinion of Fitzherbert is insinuated is plainly mistaken, for it makes no mention of justices of peace but only of justices of gaol delivery; to which may be added that the said statute is express that they shall have power so to do at the king's suit which must be either taken to exclude the suit of the party or to signify little or nothing.

8. A man is killed in Scotland, his feme may have appeal in England, which proves that Scotland is parcel of the realm of England, or within their jurisdiction, as it seems. Br. Appeal, pl. 153. cites 13 H. 4. In such case the wife of the deceased had her appeal before the

constable, and marshal. Co. Litt. 74. a. b. and says that so it was resolved in Q. Eliz. time, in Sir Francis Drake's case who had strook off the head of Down in partibus transmarinis, that his brother and heir might have appeal, but the queen would not constitute a constable of England, &c. Et ideo dormivit appellum.

9. Appeal may well be attached in full county before the coroner and sheriff, but there is no necessity that the sheriff be there present, for the coroner only is judge of it, and the sheriff by the statute shall controul him there; per Cheyney. J. Br. Appeal, pl. 44. cites 4 H. 6. 15. And per Strange such appeal brought before the coroner by plaint is as

well as appeal brought here in writ, and when it is removed into this court it is also of record as well as if it had been brought by writ here at first. Ibid.

Coroners may take appeal of death, and award process at the exigent, but the plea shall not be determined before him. Br. Corone, pl. 82. cites an ancient reading in the time of H. 7:

10. Appeal by a feme of the death of her husband against three. She may commence it before the justices of gaol delivery, where one is, \* and convict him, and after remove the appeal into B. R. Per Gascoigne, or might have commenced the appeal against all in B. R. at first, and have process against them who are not taken. Br. Appeal, pl. 28. cites 9 E. 4. 1. 2. St. Pl. C. 64. b. cites S. C. & S. P. says this appeal, ought to be removed into B. R.

and there process shall be made against those that are at large; by Gascoigne and Huls. Hale's Pl. C. 179. S. P.——2 Hawk. Pl. C. 156. cap. 23. S. 7. S. P. says it has been resolved, That if part of the accomplices to the same felony are in the prison which the justices are to deliver and the others are not in it, the justices shall receive an appeal against them all, which, after the trial of those who are in prison shall be removed into B. R. where the others shall be proceeded against.

11. A lord, peer of the realm, shall not be tried by his peers in appeal, contra upon indictment. Br. Appeal, pl. 97. cites 10 E. 4. 6. \* [543] Br. Corone 152. cites S. C.

12. It

12 Rep. 32.  
Trin. 5 Jac.  
in the case  
of commis-  
sions S. C.  
cited per  
cur. and

12. It was doubted by what warrant *justices at the assises* hold pleas of appeals of *robbery*, and it seemed to all here [in C. B.] that it is by virtue of the commission of gaol delivery, but of appeal of murder the statute 2 or 3 H. 7. gives them power by express words. D. 99. a. pl. 62. Pasch. 1 Mar. Anon.

said that justices of assise held plea in appeal of *murder* by the stat. W. 2. and 3 H. 7. and of robbery by commission of gaol delivery. — 2 Hawk. Pl. C. 30. cap. 7. f. 9. cites S. C. and says it seems that the meaning of this report of Dyer ought not to be intended that justices of assise have no jurisdiction as to an appeal of robbery without an express commission of gaol delivery; for since they have power as such by the statute De Finibus to deliver gaols of all manner of prisoners after the form of gaol deliveries, it seems they may deliver such gaols of persons proceeded against by way of appeal commenced before them as well as those proceeded against by way of indictment. And that Dyer ought to be understood that justices of assise may hold plea of appeals of robbery by the commission of gaol delivery given them implicitly by the statute De finibus, in respect whereof they seem to have all the power of justices of gaol delivery whether given by common law or statute, as fully appears by what follows in that report of appeal of murder given by the statute 2, or 3. H. 7.

St. P. C. 64.  
a. (A) S. P.  
—Hale's

13. Appeal lies either *by writ original or by bill*. The original writ issues out of Chancery. 2 Inst. 420.

Pl. C. 179. S. P. and says that appeals by bill may be prosecuted against any that is in custodia marischalli or let to bail. — 2 Hawk. Pl. C. 155. cap. 23. S. 1, 2. S. P. but says the original writ is returnable only in B. R.

14. It seems clearly to follow from the purport of the statute of Westm. 2. cap. 29. that bills of appeal may be commenced and determined before *justices specially assigned* in special cases, and for certain causes to hear and determine them. 2 Hawk. Pl. C. 156. cap. 23. f. 6.

## (I) In what County to be brought or Tried.

\* It should  
be cap. 24.

1. **A** Ppeal by a feme of the death of her husband *against two*, of her husband killed at Reading in the county of Berks *by the one, that the other received him at D. in the county of S. 20 miles from Reading*; and there it was agreed clearly by Tanks, and Knivet J. that the principal cannot be in one county, and the accessory in another county, but that it shall be void against the accessory, unless it be where a *vill extends into diverse counties*, as where a man is *struck in one county, and dies in another county*, there appeal lies in the county where he died, and shall found the appeal upon the one writ, and the other upon his case, by which the accessory went quit, quod nota. But Brook says see now the statute thereof, 2 E. 6. cap. \* 34. Br. Appeal, pl. 80. cites 45 Aff. 9.

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Br. C or one  
pl 79. cites  
S. C. & S. P.  
according-  
ly.

2. In appeal, if a man be *robbed in London*, and the *felon brings the things taken into Middlesex*, appeal may be well brought in Middlesex, and in whatever county or place the felony be done, yet upon appeal in B. R. the things taken shall be brought into court, and he who has franchise to have it, as London, &c. shall have allowance there. Br. Appeal, pl. 23. cites 7 H. 4. 43.

3. Appeal was brought *in another county than where the felony was done*, and therefore it was abated by award, 5 R. 2. But it seems,

seems, that where the goods are taken in one county, and carried into another county, it is felony in each county. Br. Appeal, pl. 35. cites 11 H. 4. 93.

4. Note, that it was said by Babb. in trespass, that if a man strikes another in one county, by which he dies in another county, the heir may bring appeal in the one county or the other. Br. Appeal, pl. 3. cites 9 H. 6. 63.

But Br. Appeal, pl. 7. cites 43 E. 3. 17, 18, 19. that the appeal

shall be brought in the county where he died.

5. Appeal, and counted that he struck the deceased in the county of W. of which he died in the county of S. the defendant pleaded Not guilty, and it was tried by both counties by advice of all the justices in the Exchequer chamber. Br. Visne, pl. 80. cites 4 H. 7. 18.

Br. Corone, pl. 140. cites S. C. accordingly, but it was said

that the indictment shall be taken in the one county only.——Br. Appeal, pl. 85. cites S. C. & S. P. though in appeal he may count in both counties, by all the justices in the exchequer chamber.——Br. Appeal, pl. 83. cites 3 H. 7. 12. S. P. accordingly as to the visne; for all is one and the same felony.——Br. Appeal, pl. 149. cites 10 E. 3. S. P.——S. P. Br. Visne, pl. 78. cites 7 H. 7. 12.——Jenk. 175. pl. 48. cites S. C. & S. P. accordingly.

If a stroke be in one county and the death in another, the appeal of the murder may be brought in either county, and yet the defendant did nothing in that county where the party died but the death, which ensued upon the stroke, made the felony. 7 Rep. 2. a. in Bulwer's case, cites 18 E. 3. 32. 9 H. 6. 63. 45 Aff. pl. 9. 43 E. 3. 3 H. 7. 12. a. 14 H. 7. 18. 6 H. 7. 18. 11 H. 4. 93.——2 Hale's Hist. Pl. C. 163. cites S. C. accordingly.

A man was wounded in the county of E. and died in the county of C. and the heir brought an appeal in the county of C. where he died; upon Not guilty pleaded, the court were of opinion that the visne should come out of each county. D. 46. pl. 8. Mich. 31 H. 8. Anon.

6. And in appeal the defendant said, that the deceased assaulted him in another county, and the defendant fled as long as he could to save his life, and at last he struck him, of which he died in the other county where he is indicted, this shall be tried by both counties; per Townsend, quod omnes negaverunt. Br. Visne, pl. 80. cites 4 H. 7. 18.

Fitzh. Corone, pl. 60. cites S. C. & S. P. and says, that it was tried by both counties, by the

advice of all the justices in the Exchequer Chamber.——Br. Appeal, pl. 85. cites S. C. & S. P. accordingly, by all the justices.

7. Appeal may be in any county where the felon carries the goods; for a felon claims no property; contra of a trespassor, for there the action does not lie but in the same county where the first taking was; for a trespassor claims property; and per Frowike, the same law of indictment as of appeal, which Brooke says is law. Br. Appeal, pl. 84. cites 4 H. 7. 5.

Br. Corone, pl. 139. S. C. & S. P. for this affirms property in case of felony, but not in trespass.

——Fitzh. Corone, pl. 62. cites S. C. & S. P. accordingly, by Haffey and Fairfax.

8. If a man commits a robbery in one county, and carries the goods into diverse counties, the party robbed may have appeal of felony in which of the counties he will, but no appeal of robbery but only in the county where the robbery was committed; for it is felony in all the counties where the goods are carried; (for felony does not devest property) but it is no robbery (which ought to be done to the person of a man) but only in the county where the robbery was done. 7 Rep. 2. a. in Bulwer's case, cites 4 H. 7. 5. b. 29 H. 8. 39, 40. Dyer 11. H. 4. 93. 3 E. 3. tit. Aff. 446.

St. P. C. 63. b. (E) (F) S. P. accordingly.——2 Hawk. Pl. C. 168. cap. 23. f. 47. S. P.



2 Hawk. Pl.  
C. 168. f. 47.  
cites S. C.

9. If one takes me in the county of A. and carries me into the county of B. and robs or kills me in the county of B. he shall be appealed for this in the county of B. only, for he was guilty of a trespass only in the county of A. St. P. C. 63. (F.)

Hale's Pl.  
C. 186. ac-  
cordingly.  
—St. P.

10. Where a feme was taken in the county of E. and ravished in the county of H. the appeal was brought in the county of H. and well, and tried there only. Br. Appeal. pl. 83. cites 3 H. 7. 12.

C. 63. b. (E) S. P. accordingly. — 2 Hawk. Pl. C. 174. cap. 23. f. 71. says there is no doubt but this, like all other appeals, is a local action, and consequently ought to be brought in the county where the felony was done.

A man was  
struck in  
Middlesex,  
and died  
thereof in  
London; the  
issue was  
tried by  
those of  
Middlesex  
only but

11. A man was arraigned upon indictment taken before the coroner of London, for that he struck J. N. at D. in the county of Middlesex, and of which he died at London within the year, and he was discharged per cur. But appeal may be suffered in this case if both counties can join, for the one county cannot find the striking in the other, quære inde in appeal, but this is aided by the joinder; but Brooke says, see now the new statute thereof in the time of E. 6. Br. Corone, pl. 142. cites 6 H. 7. 10.

it was said that the reason thereof was because London and Middlesex cannot join. D. 46. pl. 8. Mich. 31 H. 8. obiter. — D. 40. b. pl. 71. S. P. accordingly.

In an appeal of murder, where the fact is committed in Essex and the accessory before the fact is in another county, the appeal shall be brought where the fact is committed, and the trial shall be by both counties where they can join: but where they could not join, the trial of the accessory failed at the common law; but now by the statute of 2 E. 6. cap. 24. the appeal shall be brought where the murder was committed against the principal and accessory, although their crimes were committed in several counties. In an appeal of robbery or other felony, where the counties cannot join, the appeal against the accessory fails; for the said statute does not extend to it. Jenk. 77. pl. 49.

2 Hawk.  
Pl. C. 168.  
cap. 23. f.  
47. says,  
that if one  
brings my

12. If one menaces me in one county to bring 20l. to him in another county, and because of the menace I carry it thither to him accordingly, quære where the appeal of this robbery shall be brought. St. P. C. 63. b. (F)

goods into the county of B. by reason of a menace in the county of A. it may be questioned which is the proper county for the bringing the appeal.

At common  
law, if a  
man had  
received a  
mortal  
wound in  
one county  
and died in  
another,  
the wife or  
next of kin  
had their  
election

13. By 2 & 3 E. 6. cap. 24. an appeal of death may be commenced, taken, and sued in the county where the party stricken or poisoned shall die, as well against the principal as accessory, in whatsoever county such accessory be guilty thereof; and the justices before whom such appeal is prosecuted within the year and day after the offence commenced, shall proceed against every such accessory in the county where such appeal is so taken, in like manner as if the offence of such accessory had been committed in the same county, as well concerning trial by jurors, upon the offenders plea of Not guilty as otherwise.

to bring their appeal in either county, but the trial must be by a jury of both counties; but that mischief is remedied by this statute, which provides, that not only an appeal shall be brought in the county where the party died, but that it shall be prosecuted, which must be to the end of the suit. 3 Mod. 121, 122. Hill. 2 & 3 Jac. 2. B. R. per cur. in case of Banton v. Offley. — 3 Inst. 48, 49. S. P. accordingly. — St. P. C. 63. a. b. (D) cap. 13. S. P. accordingly. — 2 Hawk. Pl. C. 163. cap. 23. f. 34. Serjeant Hawkins says, he takes it for granted, that such an appeal in the county where the party died, may, since the making this statute, be tried by a jury of such county, without the joinder of any other.

Jo. 255. pl.  
8. Sently

14. The husband was killed at M. in Montgomeryshire, the wife brought



brought an *appeal in Shropshire*, and upon trial there had a verdict, and the defendant found guilty. It was moved in arrest of judgment, \* that the appeal ought to have been brought in Montgomeryshire where the fact was done, and resolved that the writ should abate; for it is against a fundamental rule of law, that a trial for murder by appeal or otherwise should be out of the county where it is committed. And at the end of the report is a note, that the statute 26 H. 8. cap. 6. allows that indictments may be in *counties next adjoining*, but there is *no mention therein of appeals*; and for this reason certioraries have been granted to remove indictments out of the grand sessions, but never writs of appeal. Cro. C. 247. pl. 8. Hill. 7 Car. B. R. Soutley v. Price.

v. Price,  
S. C. ad-  
judged per  
tot. cur. ac-  
cordingly,  
after divers  
arguments.

15. In an appeal of murder the appellant declared, that the defendant did assault her husband, and *wounded him in Huntingdonshire*, of which wound he *died in Cambridgeshire*. It was objected, that the trial was by a jury of Cambridgeshire when it ought to be of both counties; but the court held the trial good, and this by the statute 2 & 3 Ed. 6. cap. 24. which enacts, that *where an indictment is found by a jury of the county where the death happens, it shall be as effectual in the law, as if the stroke had been in the same county where the party died*; adjournatur. 3 Mod. 121. Hill. 2 & 3 Jac. 2. B. R. Banfon v. Offley.

2 Show.  
510. pl.  
472. S. C.  
adjournatur,  
as to this  
point.—  
3 Salk 38.  
Banfon v.  
Offley, S. C.  
and the  
court men-  
tioned this  
statute.—  
Comb. 45.

S. C. but S. P. does not appear, but says the court inclined to give judgment on another objection there mentioned, but that it was adjourned on other exceptions [which seems to intend the objection here.]

## (K) One or several. In what Cases there shall be one or several Appeals.

1. **I** *F one robs me of two things at one time*, I cannot have several appeals, and put parcel of the thing taken in one appeal, and parcel in another, but I must bring one appeal of all or of parcel. St. P. C. 65. b. (D) cites Mich. 45 E. 3. Corone 100.

Hale's Pl.  
C. 184. says,  
that if a man  
be robbed at  
several  
times, he

must put all into one appeal. [But quære if not misprinted.]

2. Feme brought *appeal* before the justices, the mayor and recorder of London, at Newgate, *against one who was acquitted at her suit*, and *this defendant and 7 others were indicted of the murder of the same baron*, and *she would have other appeal against the others*, and was not suffered; for by the justices, if she brings appeal against one, be he acquitted by nonsuit after appearance, or by other acquittal, she shall not have other appeal against any others, by which they were arraigned at the suit of the king and acquitted. Br. Appeal, pl. 14. cites 47 E. 3. 16.

3. *Appeal of larceny* against J. H. who *pleaded Not guilty*, and after another *appealed him of other larceny*, and he was found guilty at the suit of the first plaintiff, and that the plaintiff made fresh suit, and the court inquired *ex officio* by the same inquest, whether he was

Br. Restitu-  
tion, pl. 4.  
cites S. C.

guilty of the larceny in the 2d appeal which said that he was, and that the 2d appellor made fresh suit, and the one appellor and the other *had their goods*, with which the appellee was taken with the mainour, and the appellee was hanged. Br. Appeal, pl. 21. cites 7 H. 4. 31.

4. One man may be appealed *as principal and accessory* in one and the same appeal. St. Pl. C. 65. b. (D) cites Mich. 7 H. 4. 23. by Gascoigne.

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5. In appeal of *rape of his feme*, the defendant said that he has other appeal pending of the same rape. Per Tirwit, He may make divers rapes at divers times; but quære of 2 appeals; for the defendant cannot die but once. Br. Appeal, pl. 32. cites 11 H. 4. 13.

S. C. cited  
St. P. C. 65.  
b. (C) &  
S. P. ac-  
cordingly;  
but says that  
by the ancient  
law a man might  
have had  
divers ap-  
peals, viz.  
one against  
the princi-

6. A feme brought appeal, and the defendant said that *at another time the feme brought appeal against others of the same death* before justices of gaol-delivery in the county of N. *who at her suit were attainted and hanged*, and prayed allowance, and to the felony Not guilty; and by award the *plaintiff took nothing* by her writ, *by reason that she had judgment against others in other appeal*; for *she ought to have joined all in one appeal*, and shall not have *several appeals of death*. And if they were in *divers gaols or counties*, or if *one is taken and the others not*, yet the appeal shall be against all. Br. Appeal, pl. 28. cites 9 E. 4. 1. 2.

pal and another against the accessory, as appears by Britton and Bracton, and also by Hill 28 E. 3. 90. [Fitzh. Corone 138. cites S. C.] where a feme sued an appeal of the death of her husband against the principal and aiders, and another appeal against the receivers, and the two appeals were maintained &c. but says that the law has since been changed, and that now there shall be but one appeal which shall comprehend the principals and accessories, unless in special cases. As if one in one county procures a person to rob or kill another in another county; so where one receives a felon after the year and day, and my appeal commenced, I may have other appeal against this accessory, and cites 26 Ass. 52. — S. P. accordingly Hale's Pl. C. 188. — In appeal against A. B. and C. if A. only appears the count must be against all by the better opinion. Hale's Pl. C. 188 — 2 Hawk Pl. C. 183. f. 93. cites the case in Brooke and Staundford, and says that the principal case of 9 H. 4. 1. which seems the chief foundation of those opinions, seems to be only that where an appellant has had judgment and execution in one appeal he shall not afterwards have another against persons not named in the first; and says that all the precedents of counts, wherein some defendants have not appeared, though they mention the persons absent and shew how they were guilty, yet they all express that the appellant instanter appellat those only that appear, and would in like manner appeal those absent if they were present; and so seems clearly implied that another declaration shall be against them when they appear, and that this declaration is as against those only that appear. — 4 Rep. 47. b. in pl. 12. S. C. cited accordingly.

7. A man may have divers appeals of *maihem* against those who gave him *divers maihems in one and the same affray*; for it is divers maihems. But *contra of death*; for a man has not but one death. Br. Appeal, pl. 28. cites 9 E. 4. 1. 2.

One appeal  
shall be  
brought  
against all  
the principals  
and accessaries,  
and the  
accessaries of  
the accessaries

8. The wife brought one *appeal* of murder of her husband *against several*, and *after she brought 7 several appeals against several persons of the same murder, as principals*. It was resolved per tot. cur. That all the appeals except the first ought to abate; for clearly all the principals and accessaries before the murder, and all accessaries after, and before the writ purchased, against whom the plaintiff would bring appeal, ought to be named in one writ,

and

and not in divers: 4 Rep: 47. pl. 12. Hill. 45 Eliz. B. R. Waite's case. ries; for there is only one

appeal to be brought; and if any one be omitted, he cannot be sued by another appeal; but the omission of any of them does not vitiate the appeal, as to those against whom it is brought. *Pœnæ sunt restringendæ.* Resolved by the counsel. Jenk. 29. pl. 56.——Jenkins says he understands the case of accessaries of accessaries to be before the fact; for such may have accessaries, for they are quasi actors in the fact; but as for accessaries after the fact, they cannot have accessaries. Jenk. 29. pl. 56.

9. Two persons were indicted for murder at the sessions at Exeter. The one was convicted and attainted, the other acquitted; and against him the widow brought her appeal, and he removed himself hither by *habeas corpus*; and the plaintiff moved to have an *habeas corpus* to remove the body of the other who was attainted, which was denied, and it was said that she might arraign her appeal against the other alone. Skin. 634. Hill. 7 W. 3. B. R. Reynolds and Kening, al' Keninge.

(L) False Appeal. Punished How.

[ 548 ]

1. 13 E. 1. ENACTS, That if the appellee of felony acquits himself in due manner, &c. the justices before whom, &c. shall punish the appellor by a year's imprisonment, and render \* damages, and also make a grievous fine to the king. By the words (shall nevertheless make a grievous fine to the king) the

plaintiff shall make fine to the king; but this is to be intended where he is to render damages also to the defendant; for in such case, where he shall not render damages by this statute he shall not be fined, but amerced only. St. P. C. 170. a. (C) cites Pasch. 9 H. 5. 1. where the appeal abated for nonsuit, and the plaintiff was only amerced. And cites Fitzh. Corone 219. 41 Aff. [8] where the appellant after declaration was nonsuited, and the court immediately awarded process against the appellant to make fine; and there agreed that if the defendant be acquitted afterwards at the suit of the king, whereby he recovers damages against the appellant, yet the appellant shall not make a new fine, because he made one before. But suppose the defendant be found guilty of the felony at the king's suit, it seems the plaintiff has no remedy to re-have the fine paid; for it seems by the common law, that the plaintiff in appeal shall be fined for his nonsuit, and this is the reason why they awarded the fine here to be paid immediately. St. P. C. 170. b. (C)——2 Hawk. Pl. C. 204. cap. 23. s. 154. says there is no doubt but that by the express words of this statute, where ever the appellant or his abettors are by the purport thereof to render damages to an appellee, they are also to be fined to the king, and imprisoned for a year. Also it seems clear from the general purport of the books, that an appellant appearing to have brought an ill-grounded appeal, whether of felony or maihem, shall be fined in many cases wherein he is not liable to render damages by the statute abovementioned; as where he is nonsuit either against all or part of the appellees only, whether after, or as some have holden, before appearance, or where the writ abates through the default of the appellant in wilfully suing by a wrong name or a vitious writ &c. and even a feme covert suing an appeal known by her to be groundless, as for the death of a husband whom she knows to be alive, shall be fined. But it is certain that where a writ abates by the act of God, or for any other cause no way imputable to the appellant, he shall neither be fined nor amerced. Also it is certain that an infant in no case is to be fined for a false appeal; but some have holden that he may be amerced, which is contradicted by others, who say that an infant in no case can be amerced.

\* As to damages, see postea.

2. In appeal against 2, the appeal against the one was found false, by which the appellor was awarded to prison. Br. Appeal, pl. 49. cites 1 Aff. 9. Br. Imprisonment, pl. 29. cites S. C.

3. Because some pleaded and were attainted, and others came not,

not, *the plaintiff said that he would not proceed against them, and it was awarded that the plaintiff should be taken; for now it appears that his appeal is false against those. Quod nota. Br. Appeal, pl. 60. cites 22 Aff. 82.*

Br. Imprisonment,  
pl. 106. cites  
S. C. ———  
Br. fine for  
contempts,  
pl. 11. cites  
S. C. ———

4. Appeal by a feme of the death of her husband, and *at the day the baron was brought in, and she examined, and confessed that he was her baron; and for her false appeal she was committed to prison to make fine, and the baron at large. Br. Appeal, pl. 25. cites 8 H. 4. 18.*

5. Appeal of *maibem*, that the defendant beat him upon the head, by which he lost his hearing, and the defendant prayed that the *maihem* be examined, by which the justices examined him openly, and perceived that he could well hear, and therefore he shall make fine for his false appeal; but because the writ supposed it in the time of R. 2. against the peace of the said king, and the declaration was in the time of the king now, therefore he went without fine. Br. Appeal, pl. 26. cites 8 H. 4. 21.

6. In appeal the plaintiff confessed the appeal to be false. He shall be imprisoned and make fine; but contra of a nonsuit; and the fine was 100s. Br. Appeal, pl. 151. cites 13 H. 4.

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7. A felon confess'd the felony, and appealed another, who was taken, and pleaded *Not guilty*, and when the jury appeared the approver confessed his appeal to be false, by which they proceeded no further upon the approver of the approver, but gave judgment that the approver should be hanged, and they were in doubt if by this confession the appellee shall go quit; and at last per tot. cur. he was arraigned *de novo* at the suit of the king; and so see that the first assise was upon the appeal of the approver; and when he confesses his appeal false, it is as a nonsuit in another appeal, in which case the party shall be arraigned at the suit of the king, and so see that the approvement serves for indictment. Br. Corone, pl. 3. cites 3 H. 6. 50.

(M) Determined by Judgment in another Prosecution. Or by having, or praying his Clergy.

By the at-  
tainer of  
one felony,  
he is excused  
for all fe-  
lonies before;  
as it seems;  
for he can-  
not have but  
one judgment  
of death;

1. Appeal against 3, one as principal, and the 2 others as accessories of rape brought by a feme, and the principal did not come, but the 2 others came and were indicted thereof, and also of burglary, and of goods carried away feloniously; and Kirton prayed that the 2 should answer to the other felonies, though they did not answer to the rape, till the principal be attainted; & non allocatur; for by attainer at the suit of the king, the suit of the party may be lost. Br. Appeal, pl. 9. cites 44 E. 3. 38.

and see that life shall not be twice in jeopardy; viz. once at the suit of the king, and once at the suit of the party. Br. Appeal, pl. 9. cites 44 E. 3. 38. ——— Br. Corone, pl. 11. cites S. C. & P. But Brooke says, see elsewhere that if he be acquitted of one felony, he may be arraigned of another felony done before; but judgment of death can be but once; for he cannot die twice.

Br. Corone,  
pl. 13. cites  
S. C.

2. Where 2 appeals are against one and the same man, and he is convicted

*convicted at the suit of the one first, he cannot be convicted at the suit of the other, and therefore they were restored upon inquiry of the fresh suit, and of the property, &c. And so see that a man shall not have but one judgment of death; and in appeal, if the defendant has his clergy, the plaintiff shall have restitution. Br. Appeal, pl. 11. cites 44 E. 3. 44.*

3. *If a man be convicted of one felony and adjudged to be hanged, by this all appeals of any other felony done before it are determined; for a man can die but once, and one judgment of death serves for all felonies before; and yet, because the king pardoned the execution Gascoigne awarded the felon to answer to the appeal of a felony done before, which was against the opinion of Huls, for appeal once determined cannot revive, therefore quære; for it is hard to prove the appeal to revive. Br. Appeal, pl. 10. cites 6 H. 4. 6.*

Fitzh. Corone, pl. 227. S. C.

4. *In appeal the defendant pleaded Not guilty, and two other appeals were brought against him, and he was found guilty in all, and three judgments given severally that he should suffer death, and these entered severally upon each appeal, and every inquest found that the parties made fresh suit, by which they were restored to the goods in the appeal, and writ awarded to the several bailiffs. Br Appeal, pl. 93. cites 4 E. 4. 11.*

5. *In an appeal of murder for the death of his brother H. the defendant pleaded, that he was auterfoits indicted for the death of the said H. which he set forth, upon which he was arraigned, and confessed the same, and prayed his clergy, upon which the court advised, and pleaded over to the felony and murder Not guilty, and upon a demurrer to this plea the court considered the statute 3 H. 7. cap. 1. by which it is \* enacted, that if the person indicted shall be arraigned within a year, &c. and acquitted or attainted, yet the party may have an appeal, but in this case the defendant was neither acquitted or attainted, so that the statute does not extend to it, and the opinion of the court was, that an appeal would not lie. And. 68. pl. 142. Pasch. 20. Eliz. Burgh's case.*

2. Le. 160. pl. 195. 21 Eliz. B. R. Borough v. Holcroft, S. C. argued. — S. C. cited 4 Rep. 45. b. 46. a. as resolved. — 3 Inst. 131. cap. 57. S. C. adjudged that this case

*was out of the statute, and being penal concerning the life of a man, and made in restraint of the common law, was not to be taken by equity, but is casus omisus, and left to the common law. — S. C. cited per Coke, Arg as holden, that where the party is convicted at the suit of the queen, appeal does not afterwards lie. — After clergy prayed, though the court will advise upon it, and it be not actually allowed, it is a good bar to an appeal. 2 Hale's Hist. P. C. 251. cites S. C. — See Kelyng's Rep. 107. Mich. 8. W. 3. Armstrong v. Lisle, S. P. accordingly. — 2 Hawk. Pl. C. 377. cap. 36. s. 12. says, it seems to have been long settled, that not only he who has been admitted to his clergy on a conviction of manslaughter upon an indictment of murder, but also that he who being called to judgment on such a conviction has prayed his clergy, but has not been actually admitted to it, may bar any subsequent appeal for the same death as he might by the common law; and as to the objection to the seeming absurdity, that if the law be so, he that has his clergy on a conviction of manslaughter will be in a better case than if he had been wholly acquitted, it may be answered that this does not depend on any reasoning from the nature of the thing but from the statute of 3 H. 7. cap. 1. which expressly takes away the plea of auterfoits acquit in this case, but by suffering even persons attainted on an indictment of death, who have been admitted to their clergy, to plead such admission in bar of an appeal, plainly seems to have intended to leave the benefit of the clergy as it stood before.*

6. *One indicted of murder was found guilty of manslaughter. Afterwards an appeal was brought against him, and also against others*

\* [ 550 ]  
4 Rep. 43. b. pl. 9. Bithe's case



alias, Goff v. Bibthe S. C. resolved; and says, that the law is the same if the principal on his appeal obtains a pardon, or has his clergy allowed, the accessory is thereby discharged.

*as accessories after the fact.* It was moved, that the *principal after conviction had his clergy*, and was never attainted, and therefore the accessories to be discharged; and per tot. cur. if the principal had his clergy or pardon *before his judgment*, though it were after conviction, the accessory shall be discharged; but if he prays his clergy after he has had his judgment, as well he may, or if he be pardoned, yet the accessory shall be arraigned. And after Coke Attorney General agreed the difference taken to be good, and thereupon they were discharged. Cro. E. 540, 541. pl. 4. Eliz. B. R. Goff v. Byby & al.

Comb. 89. S. C. argued, and says, that all the justices, except Street J. (because it was adjourned it seems into the Exchequer chamber propter difficultatem) were of opinion that the plea was ill; for otherwise

7. In appeal of murder, the defendant *pleaded, t' it he was indicted, and convicted of manslaughter, and not of murder*, prout patet per recordum; and that he was clericus & paratus fuit legere ut clericus, if the court would have admitted him, and that he is the same person, &c. The appellant demurred. The truth was, that after the conviction, and before the sentence, an appeal was brought so that the defendant had not an opportunity to pray his book. This case was argued in Hill. 3 Jac. 2. in B. R. and afterwards in Trin. 4 Jac. 2. and the Ch. J. delivered the opinion of all the judges (except Street J.) who were assembled at Serjeant's Inn for that purpose, that this was no good plea, and that the court ought not to ask the prisoner what he had to say, and so to let him into the benefit of his clergy. 3 Mod. 156. Goring v. Deering. But the reporter adds tamen quære; for it is otherwise resolved.

the statute [3 H. 7. cap. 1.] would be of no use.——2 Show. 507. pl. 469. S. C. just mentioned.——Carth. 16. S. C. says that the defendant also pleaded that he demanded the book, and was always ready to read when it should be required of him, & hoc &c. sed adjournatur.——S. C. cited 4 Mod. 100. as to the opinion of the judges; but as to that says quære tamen; for that the law seems to be otherwise.——Carth. 17, 18. Mich. 3 Jac. 2. B. R. Penrose v. Welch and Power S. P. only the defendant omitted pleading that he demanded the book to perform his clergy, but pleaded that they were clerks, and then and still are ready to read: The case was argued, but nothing said by the court.

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8. The words of the statute of 3 H. 7. cap. 1. are general, viz. in an appeal brought, or to be brought, and therefore extend to all appeals, whether antecedent, concurrent, or subsequent, and so it is if clergy was *not had by default of the court*. 1 Salk. 63. pl. 3. Hill. 8. W. 3. B. R. Armstrong v. Lisle.

9. Where a person has *had his clergy*, he shall *have time to plead*, but it must be *Quasi instantur*, and as of this day, and no imparlance entered. 12 Mod. 416. Mich. 12 W. 3. Wilmot v. Tyler.

10. *At common law*, if a man was *indicted and attainted of any felony, or acquitted upon this indictment*, an appeal did not lie, for it would be in vain, for an attainted person is dead in law; but because the king might pardon such attainder at this day in case of the killing of a man, be the offender attainted or acquitted before, if he has not had his clergy, he is liable to an appeal, by the statute of 3 H. 7. cap. 1. but all other felonies remain at common law. Jenk. 160. pl. 4.

11. In an appeal at bar, the appellee was *found guilty of manslaughter*.



*ter only*, whereupon he prayed the benefit of his clergy; and the court being of opinion, that the statute that gives the clergy extends to appeals, and that the *burning in the hand*, being no part of their judgment, the queen could pardon it, according to BIGGIN'S CASE, 5 Rep. 50. thereupon the appellee was *immediately discharged without bail*, being pardoned by the late *Act of grace*. 11 Mod. 254. pl. 7. Mich. 8 Ann. B. R. Smith v. Bowen.

(N) Process and Proceedings.

1. **A**Ppeal of rape, the defendant pleaded Not guilty, and was *let to mainprise* to attend the inquest, and after came not, and *capias, alias & pluries* issued, and was returned, and he came not. Scott awarded *exigent*, and said that if he appeared pending the exigent, he should try to remove the inquest; for he is *without day by the exigent*, and he cannot take the inquest by default, in as much as it was in case of felony. Br. Appeal, pl. 54. cites 16. Aff. 13.

Br. Process, pl. 148. cites S. C. and says that if the exigent be returned served, then it seems clearly that he is attainted.

2. Br. Appeal, pl. 55. cites 17 Aff. 1. that it was said, that before this time there were *no mainpernors* taken in appeal, but *pledges of the battail*.

3. Note if a man would sue appeal of *felony, robbery, or larceny*, he must come in full county within the year and day after the fact, and find sufficient pledges to prosecute, and immediately make the coroner enter the appeal in his roll, and be sent to the bailiff that he have the body of the appellee at the next county, and if the bailiff testifies in two counties that *Non est inventus*, then the appellee shall be demanded from county to county till he be outlawed, and if the plaintiff makes default at any county, then the exigent shall cease till the eyre of the justices in this county, and the plaintiff shall lose his appeal for ever. Br. Appeal. pl. 62. cites 22 Aff. 97.

4. Infant within the age of 18 years sued appeal of the death of his father against J. N. who was thereof indicted, and by his nonage the appeal was abated, and the infant amerced, and the amercement pardoned because within age, and not awarded to prison, and the defendant arraigned at the suit of the king, and pleaded to the country, and was not let to mainprise, and the infant prayed *venire facias* for the king, and could not have it, because within the year of the death, in which case the law may intend that another may have the suit yet within the year; but Knivet said that he shall deliver the writ to the sheriff, but no inquest shall be taken within the year; quære if it be intended that another who is heir within the year, and of full age, may have the appeal, as where the infant heir dies, and the uncle is heir by his death whether he shall have the appeal after the infant has brought appeal, and his appeal abated by infancy? or if an elder son be found? Br. Appeal, pl. 75. cites 41 Aff. 14.

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5. Appeal by a feme against three of the death of her husband,

S f 4

And it was agreed that

*exigent shall not issue against the accessories till the principal is attainted by verdict or outlawry, where the court may be apprised who are principals and who accessories.*

*and process continued till exigent issued, and at the exigent two rendered themselves in the county, and the third made default, and was outlawed, and the feme counted against the two as receivers of the third in the county of Dorset after that the third had killed her baron in the county of Kent, and therefore the two prayed to go quit, & non allocatur till they had pleaded, by which they pleaded Not guilty, and after were let to mainprize, and after the court awarded that the defendant should go quit for the cause aforesaid, Br. Appeal, pl. 7. cites 43 E. 3. 17, 18, 19.*

6. Appeal by a feme of the death of her husband *against three generally, one is outlawed, the others render themselves at the exigent, and the plaintiff counts against those 2 as accessories, and yet the exigent well awarded, because it does not appear in the appeal who was principal and who accessory, and e contra if this had appeared; for then exigent shall not issue against the accessory, till the principal be outlawed. Per Knivet J. Br. Appeal, pl. 79. cites 44 Aff. 16.*

S. P. Br. Appeal, pl. 140. cites 48. Aff. 3.

7. Appeal of death before the sheriff and the coroner in the county of H. and writ and came to them to remove the appeal into B. R. who sent it accordingly, and because *the appellor was without day in the appeal before the sheriff and coroner, scire facias issued to maintain his appeal, and the sheriff returned nihil, by which issued sicut alias, and the sheriff returned nihil, by which the defendant prayed to go quit, and could not, but other sicut alias awarded, and the defendant let to mainprise, &c. for it may be that the plaintiff has been warned in another county. Br. Appeal, pl. 15. cites 48 E. 3. 21.*

8. In *appeal* the sheriff had not returned any pledges de prosequendo, but because the *defendant had appeared in court* he was put to answer, and the plaintiff found pledges in the court. Thel. Dig. 218. lib. 16. cap. 1. s. 8. cites Mich. 11 H. 4. 7.

9. The writ to remove an appeal was *directed to the sheriff, which ought to have been to the coroner, and therefore that which comes here by such writ shall not be said of record here. Br. Appeal, pl. 44. cites 4 H. 6. 15.*

10. The defendant *pleaded charter of pardon, which was allowed, and he dismissed, and the mention of the pardon was entered upon the declaration and not upon the indictment whereas cesset processus ought to have been made upon the indictment also, by which process of outlawry issued upon the indictment, and the defendant outlawed and taken by capias, and demanded what he had to say, Why he should not be put to death? and be cast in writ of error, and shewed the allowance of the charter in avoidance of the outlawry, & ei allocatur, and surty was demanded of him, and scire facias against the lords mediate and immediate, and there it was surmised that he had not land nor tenement, and the attorney of the king confessed it, and therefore because he had been twice vexed for one and the same felony, therefore he paid his fees, viz. only*

only 2 dozen of gloves, and was dismissed. Br. Appeal, pl. 92. cites 4 E. 4. 10.

\* 11. The appellant shall be sworn that his appeal is true, and therefore donee of goods to other use shall not be compelled to maintain appeal, for he shall not be compelled to swear. Br. Appeal, pl. 95. cites 7 E. 4. 27.

12. Appeal against four, all shall be named together in the process till it comes to the exigent, and then the plaintiff shall assign who are principals, and who accessaries, and exigent shall issue against the principals, and process shall be continued by capias against the accessory, for the accessory ought not to be attained by process jointly with the principal. Br. Assise, pl. 107. cites 20 E. 4. 7.

13. If appeal be without day by demise of the king, there if the king pardons the defendant, and the plaintiff does not bring his re-attachment within the year to revive the appeal, the pardon shall be allowed. Br. Charters de Pardon, pl. 69. cites 2 H. 7. 10.

14. An appeal was brought for the death of a man; pending the appeal, the plea is discontinued by the king's death; a re-attachment ought to be sued within a year after the king's demise; the appellant does not sue it; the king pardons the appellee; this pardon shall be allowed without awarding a scire facias against the appellant; for it appears on record, that the appeal is extinct; and it would be in vain in this case to award a scire facias. By the justices of both benches. Lex nil facit frustra. This case is remedied at this day by the stat. 1 E. 6. cap. 7. the appeal continues notwithstanding the king's demise. Jenk. 169. pl. 29. cites 6 H. 7. Fitzh. Re-attachment 13.

15. In an appeal of murder directed to the wardens of the Cinque Ports, the writ was returned in B. R. and filed, and the defendant brought to the bar, and because the proceedings were void by reason that the writ should have been directed to the sheriff of Kent, the appellee was committed to the Marshalsea, and a bill was filed against him of appeal of the murder *as in custodia mareschalli*, and afterwards he was executed thereupon. Cited per cur. 2 Ld. Raym. Rep. 1290. Trin. 8 Ann. as Cro. E. 694. [pl. 5. Mich. 41 Eliz. B. R. and] 778. [pl. 12. Mich. 42 & 43 Eliz. B. R.] Watts v. Brains,

S. C. cited Yelv. 13. — Noy. 171. S. C. but S. P. does not appear. — Comyns's Rep. 259. cites Cro. E. 6. [but is misprinted, and should be as in the principal case] Watts v. Brains.

16. When a process is returned in appeal another ought to issue instantly without any mean day betwixt, for then there is a cessation of the prosecution, and absolutely discontinued. Resolved. Cro. J. 283. 284. pl. 4. Trin. 9 Jac. B. R. Bradley v. Banks.

Bulst. 143. S. C. & S. P. held accordingly. — Yelv. 205. S. C. &

S. P. held accordingly, and says that so is Stamford and all the precedents in B. R. — The case was a writ of appeal was returnable quinden. Mich. which was 16 Oct. whereas it should be returned a die Sancti Mich. in 15 Dies, which was 16 Oct. and the capias bore teste the 23d Oct. whereas it should have been attested from the first writ returned, viz. 16 Oct. and returnable octabis Hillarii, all which was entered on the roll, and so 7 days omitted between the return of the writ of appeal and the awarding the capias, and this was objected to be a manifest discontinuance. And though this was said by the other side not to be material, it being all in one term (which is but as one day in law) and that the appearance of the party aided this discontinuance, yet all the court

court resolved that it is a discontinuance. Cro. J. 283. pl. 4. Trin. 9 Jan. B. R. Bradley v. Banks. —Yelv. 204. S. C. adjudged for the defendant per tot. cur. and agreed that no appearance by the defendant in appeal will aid any discontinuance of suit. —Bulst. 141. S. C. and S. P. accordingly, and the writ of appeal was quashed and the defendant discharged.

17. All writs of appeal must be returnable in B. R. 2 Hawk. Pl. C. 156. cap. 23. §. 5.

18. An appeal of murder *de morte viri* was carried down to be tried at nisi prius in Yorkshire, where both parties appeared, but the appellant did not put in the record to try the issue. It was moved that the appeal being not tried, it was either a nonsuit or a discontinuance. But Holt Ch. J. was of opinion that it was neither; but ordered the appellant to pay costs for not going on to trial. 12 Mod. 65. Mich. 6 W. & M. Sutton v. Sparrow.

[554] 19. The return of a writ of appeal was *attachiari feci*, whereas it should be *attachiavi*, and this was held a full answer to the writ. 4 Mod. 290. Trin. 6 W. & M. in B. R. Wilson v. Law.

2 Salk. 589. pl. 1. S. C. & S. P. held accordingly. —4 Mod. 290. 293. S. C. the court held the words, viz. *Attachiari feci prout mihi præcipitur*, a full answer to the writ. —Comb. 293. S. C. & S. P. and Holt Ch. J. at first thought it ill unless cured by the defendant's appearance; but afterwards it was resolved to be well enough. —Carth. 331. 333. S. C. & S. P. and the return held good, because it is said to be done *virtute brevis*, which, by the conclusion *paratum habeo*, amounts to *attachiavi*. But per Holt Ch. J. it would have been ill if the words (*virtute brevis*) had been omitted. —Ld. Raym. Rep. 20. S. C. & S. P. and the return adjudged good, because it was *virtute brevis prædicti prout mihi præcipitur*. —Skin. 552. S. C. & S. P. and the court held it all one.

But if the return of the writ is naught this will not be helped by the defendant's appearance, for appearance helps only when the party comes in and pleads to issue, but not when he comes in and challenges the process upon the account of its defect. Per Eyre J. 1 Salk. 59. pl. 2. Trin. 6 W. & M. in B. R. in case of Wilson v. Laws. —S. P. by Eyre J. accordingly. Ld. Raym. Rep. 21. —S. P. held accordingly per cur. Carth. 334. in S. C.

Skin. 670. pl. 6. S. C. and per Holt Ch. J. the appellee ought, after the appeal returned upon the certiorari, to sue a *scire facias* against the appellant ad prosequendum; for the appellant has no day in court. —1 Salk. 62. S. C. & S. P. and a *scire facias* being taken out returnable

20. The defendant was indicted at Carlisle of murder, and found guilty of manslaughter. The brother of the deceased immediately exhibited his bill of appeal, and the appellee was arraigned upon the appeal forthwith, and being put to answer he refused to plead, and nothing more was done then. Afterwards a *certiorari* to remove the indictment, and a *hab. corp.* to remove the person into B. R. was granted though opposed by the appellant, and he was brought to the bar in custodia and the returns filed, and he was committed to the marshal. The court held that the appellant is not demandable at this time, because by the certiorari he had no day in court. And therefore in such cases the only course is, for the prisoner to sue out a writ of *scire facias* against the appellant, reciting the whole matter, and so to warn him to appear at a day certain to prosecute his appeal in this court; and then if the appellant should make default on that day, the court upon demand might nonsuit him, but not otherwise. Sed per cur. the appellant may come in gratis if he will, and prosecute his appeal without a *scire facias*. Carth. 395. Hill. 8 W. 3. B. R. Lisle's case. [alias, Armstrong v. Lisle.]

at a common day, and no return being made by the sheriff. the prisoner moved again for his discharge; but the court told him that he must take a new day and procure a return, unless he can get the appellant to appear gratis, as he may if he pleases.

21. A civil cause is always arraigned on the plea side, unless it comes in by attachment. Per cur. and Mr. Aston said that appeal, whether

whether by writ or bill was always *arraigned in English on the plea side, unless it came by certiorari*; for then it was ruled on the crown side; and accordingly it was ruled in this case, but not to make a precedent. 1 Salk. 62. Hill. 8 W. 3. B. R. in case of *Armstrong v. Lisle*.

22. The *conviction* being returned by *certiorari*, the appellant would have taken exception to it; but Holt Ch. J. would not allow it, and said that they are strangers to this record, and they have not any privity or authority to take exceptions. Skin. 670. 671. pl. 9. Mich. 8 W. 3. B. R. in case of *Armstrong v. Lisle*.  
 1 Salk. 60. S. C. & S. P. and per cur. this is the king's record, in which the appellant cannot assign errors; for he is a stranger, and perhaps the prisoner has released these errors to the king, and the appellant has no warrant of attorney, and ought not to speak or be heard in the cause.——Comb. 411. S. C. & S. P. and Holt Ch. J. said that none but the king or the prisoner can assign error in the conviction.

23. On the *day on which an appeal was returnable*, it was moved that the appellant should be demanded. Per. cur. There is no writ returned, so no appeal pending; and the sheriff has all this day, the court sitting, to make a return; but it was agreed if the writ were returned, they might come and have the appellant demanded, and if he did not come, they should be discharged; and a motion for appellant that the sheriff should return his writ was denied, there being no affidavit that it was delivered to the sheriff. 12 Mod. 349. Pasch. 12 W. 3. *Stout v. Marson & Cowper*. [ 555 ]

24. An appeal was brought by an infant, and the sheriff delivers it up to him, who cancels it. Adjudged a contempt, and the sheriff fined. 12 Mod. 372. *Stout v. Towler*.

25. Note in appeal, the year having expired, the appellant could not have a new writ of course, and for this they petitioned the lord-keeper for a new writ, who assembled Treby Ch. J. of the Common Pleas, Sir John Trevor Master of the Rolls, and Justice Powell to advise of it; who all agreed it was discretionary to grant one or no; but agreed it was not proper to do it. 12 Mod. 375. Pasch. 12 W. 3. in case of *Stout v. Towler*.

26. Where a man is bailed upon an appeal of murder to appear from day to day, if he makes default it shall be recorded, and process shall go against his bail, and a *capias* against himself; and if he does not make default, but comes in discharge of his bail, he shall be committed as at first; per Holt Ch. J. 12 Mod. 428. in case of *More v. Wats*.

27. In writ of appeal there ought to be 15 days between teste and return. Admitted. 1 Salk, 63. pl. 4. Pasch. 13 W. 3. B. R. *Wilmot v. Tyler*.

28. The original writ of appeal ought to be returned *Non est inventus before a capias* awarded; per cur. 12 Mod. 554. Trin. 13 W. 3. Anon.

29. After acquittal on an indictment for murder an appeal was brought, and the judge of assise gave the appellee time to the next assise; but in the mean time the appellant brought an *habeas corpus* and *certiorari* to remove the body, &c. and the record into C. B. and afterwards at a judge's chamber the parties agreed, and the appellee being bailed, he appeared upon his recognizance, and produced a release.  
 1 Salk. 382. The Queen v. Culliford, Mich. 3 Ann. B. R. the S. C. but S. P. does not ap-



pear. —  
6 Mod. 219.  
S. C. & S. P.  
according-  
ly.

release from the appellant, and moved that he might be discharged, and counsel appeared for the appellant to consent. But per Holt Ch. J. *the habeas corpus and certiorari must be returned, and then the court will be possessed of the record, and the appellee must be arraigned, and then he may plead the release; or if the appellant is not ready at the return, &c. to arraign the appeal, or does not appear, he may have a scire facias against him to compel him to it; and if he does come in at the return thereof, he shall be nonsuit, and yet the appellee is not thereby discharged; for here being a record against him in court, he must be arraigned at the suit of the queen, and then he may plead Auterfoits acquit, &c.* 3 Salk. 39. Culliford's case.

30. There must be 4 bail in an appeal of murder; per cur. 11 Mod. 218. Pasch. 8 Ann. B. R. in case of Young v. Slaughterford.

31. In appeal the defendant was brought up on the return of the writ, wherof notice had been given to the appellant, and that the court would be moved to bail him. The plaintiff not appearing, the court was moved either to discharge or bail him; but it was then denied, because they would consider if there were not 4 days of grace in this as well as in other actions for the party to appear in; and then being brought up again, Lee J. said that it appeared by 4 Mod. 99. that the parties have 4 days to appear in, and thereupon was remanded till the last day of the term, when the appellant not being ready to count against him, he was discharged. Barnard. Rep. in B. R. 423. Hill. 4 Geo. 2. Tucker v. Mackerston.

## [ 556 ] (O) Writ abated in what Cases. And the Effect thereof.

At the com-  
mon law  
these ex-

1. 6 E. 1. *Provides that no appeal shall be abated so soon as have been heretofore.*  
cap. 9.

ceptions were allowed to the plaintiff in appeal of death, that the plaintiff was not present at the mortal wound given, or felony done. 2 Inst. 317.

If the writ of appeal doth comprehend the special matter, viz. That the husband or ancestor was slain *se defendendo*, or by misadventure, the writ of his own shewing shall abate; for an appeal lies not of such a killing, because the end of the appeal of death is, that the appellee may have judgment of death, viz. Death for death. 2 Inst. 317.

This clause, if taken by itself generally and literally, as some have taken it, extends to all appeals, as of death, robbery, rape, felony, maihem, &c. but the words themselves shew that this act is only extended to the appeal of the death of man; and therefore appeals of robbery, rape, and other felony and maihem, are not within this act; for the mischief was, as has been said, in the case of the death of man. 2 Inst. 317.

Br. Impri-  
sonment,  
pl. 9. cites  
S. C.

2. In appeal against baron and feme and another, the baron died pending the writ, and process was prayed against the feme and the 3d person, because the writ is not abated by the death of the baron. Candish said, that the feme upon this writ shall not be compelled to answer, and you may have new writ upon such cause without being imprisoned; for it is not abated by your default. Br. Appeal, pl. 16. cites 50 E. 3. 1.

3. In



3. In appeal of felony brought *against a feme covert* without her baron, she shall be named by her name of baptism, and *feme of such a one*. Thel. Dig. 50. lib. 6. cap. 2. f. 6. cites 1 H. 4. 5.

4. In appeal of *maibem* the writ was *contra pacem regis R.* and the declaration was *contra pacem regis nunc H. 4.* by which the defendant went quit without fine. Br. Variance, pl. 107. cites 8 H. 4. 21.

5. A feme sued appeal by name of *Cicely*, where her name was *Joan*; and after the defendant had imparled, she came and said that her name was *Joan*, and it was examined if covin, &c. and it was found that no covin, by which she went without making fine. Quære if she shall have new appeal by name of *Joan*. Br. Appeal, pl. 38. cites 9 H. 5. 1.

6. Appeal by *feme of the death of her father*. The court shall abate it ex officio. Br. Office del, &c. pl. 29. cites 10 E. 4. 7.

7. Appeal of death was taken in London, and after issue of Not guilty, and process made against the jury which remained for default, &c. the plaintiff discontinued his suit, and because the indictment was in B. R. he brought appeal there; and by the reporter the last appeal shall abate, because the first appeal in L. put his life in jeopardy once. Br. Appeal, pl. 103. cites 16 E. 4. 11.

If an appellant brings a new appeal pending a former writ or bill of appeal, whereon he

hath appeared, the defendant may plead such former appeal in abatement of the second, unless the first were by bill before the sheriff and coroners, which is of so little regard that it shall not be pleaded in abatement of a second before it is removed into the king's bench by certiorari, nor even then till it appear, by the plaintiff's appearing upon it, &c. to have been removed by him, and not by a stranger. 2 Hawk. Pl. C. Abr. 173. f. 76.—2 Hawk. Pl. C. 190. cap. 23. f. 124.

8. If the defendant in appeal pleads *misnomer of his sur-name*, the appellant may aver that *known by the one name and the other*. 2 Hale's Hist. P. C. 238. cap. 30. cites 1 H. 7. 29. a.

If one of the defendants who doth not appear be either misnamed or were dead

9. But if misnomer be pleaded of the christian name, the appellant must take issue, and cannot plead that conus by the one name or the other. Ibid. cites S. C. and 21 E. 3. 47. b.

before the writ purchased, it is a good plea for any of the defendants who appear, that there was not at the time of the purchase of the writ, nor hath been since, any such person in rerum natura as such defendant, &c. whereon if issue be joined and found for the pleader, the writ shall be abated as to all the defendants. But it is no good plea that there is no such person as A. B. of C. yeoman, &c. because it implies a negative pregnant. Neither can a man plead misnomer of any one but himself. 2 Hawk. Pl. C. Abr. 173. pl. 77.—2 Hawk. Pl. C. 191. cap. 23. f. 125. S. C.

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10. In an appeal of murder against W. O. of B. &c. yeoman, and M. O. of B. &c. spinster, alias dict' M. O. spinster, W. O. did not come, but M. O. before the return of the exigent appeared, and pleaded to the writ that she was a gentlewoman, and not a spinster; (for in truth she was the daughter of Sir Edw. Gorge, and W. O. her husband was likewise a gentleman) and pleaded over to the felony Not guilty. The plaintiff replied, that she had appeared and brought a supersedeas to the exigent by the said name, and demanded judgment if now she should be admitted to plead this misnomer to the appeal; and thereupon the defendant demurred; but afterwards, upon seeing the opinion of the court, she waived it, and pleaded Not guilty, and then the parties agreed. D. 88. a. pl. 107. Trin. 7 E. 6. Allington v. Oldcastel.

See 2 Hawk. Pl. C. 185. cap. 23. f. 102.

S. C. cited  
2 Ld. Raym.  
Rep. 1290.

11. Appeal of murder *against* 4 by original writ. They all *appeared* at the bar at the return of the writ. The *plaintiff would have declared against them as in custodia mareschalli*; but the court ruled that he could not, unless there be a record *Quod committitur mareschallo*, or that they put in bail; and the writ being faulty for *want of addition of one of the defendants*, he would not declare against them; whereupon he was demanded and nonsuited, and the defendants discharged. And if he had declared, and the writ had been abated, it would have been peremptory to him. Cro. E. 605. pl. 1. Pasch. 40 Eliz. B. R. Holland v. four others.

12. A writ of appeal was *quashed for defect*, and it was thereupon *moved that the defendant might be arraigned upon the count*, though the writ was abated; but per cur. he cannot, because the count is founded on the writ which is abated, and cited 4 H. 6. 14. and 18 E. 3. 35. and upon view of precedents, he was afterwards discharged. Sty. 7. Mich. 22 Car. Moor v. Savage.

13. A feme brought appeal of the death of her husband, but because it did not *appear that she was a wife to the party slain at the time of the murder*, and also for another exception, the writ was abated. Sty. 7. Mich. 22 Car. More v. Savage.

Show. 47.  
Orbell v.  
Ward, S. C.  
and held a  
discontinu-  
ance, there  
being no  
plea at all  
for a plea  
by attorney  
ought not  
to be re-  
ceived, and  
so the suit  
is disconti-  
nued, or else  
per attorna-  
tum suum

14. Appeal for the murder of her husband *against W. W. late of the parish of St. James Westminster*, in Com. Mid. The defendant in propria persona venit, and craved oyer of the writ and return; and then per J. S. attornatum suum, pleads in abatement that there is a parish named St. James within the liberty of Westminster, but *no parish named St. James's Westminster* only. The plaintiff demurred, and the cause was adjourned till next term, when the defendant had judgment, because the plaintiff by his demurrer had confessed the matter pleaded in abatement, viz. That there was no such parish, which is a good plea; but it being pleaded per attornatum, it ought not to have been received, and though it is received it is void, and by consequence was discontinued by that adjournment. 1 Salk. 59. pl. 1. Mich. 1 W. & M. in B. R. Orbet v. Ward.

is surplussage, and then it is well enough, and so a good plea, and so quacunqve via data, it is against the plaintiff, and adjudged for the defendant.—Comb. 139. S. C. Holt Ch. J. said the plaintiff should have refused the plea, and have taken judgment by nihil dicit; but that here is no plea at all, and so a discontinuance, and judgment for the defendant.—Carth. 54. S. C. And per cur. this is a discontinuance; for in this case the defendant could not make an attorney, and so this is a plea by a stranger, and in effect no plea.

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15. If an appeal *abates* for a false return, the party may sue a new appeal, and it is not like to a nonsuit; per Holt Ch. J. Cumb. 294. Mich. 6 W. & M. in B. R. Wilson v. Lawes.

12. Mod.  
416. S. C.  
but S. P.  
does not ap-  
pear.—  
Ibid 448.  
S. C. the de-  
fendant  
pleaded  
with a pro-  
testando,

16. In appeal of murder by writ, there were *but 11 days between the teste and return*. The defendant *pleaded a conviction of manslaughter, and clergy allowed*, and after would have taken advantage of the want of 15 days. The court held that this is *cured by his appearing and pleading in chief*; for the reason of the 15 days between the teste and return of originals is, that the defendant may have sufficient time to come into court, computing 20 miles to a day's journey, according to which computation, if the defendants are in England, they have time enough to come hither; and

and if he would take advantage of this defect he must plead specially, as in an assise, not attached by 15 days. And final judgment was given. 1 Salk. 63. pl. 4. Pasch. 13 W. 3. B. R. Wil-  
mot v. Tiler. that he ought not to answer the writ for want of sufficient number of days between the teste and return, pro placito dicit and sets forth an indictment at the Old Baily, and conviction of manslaughter, and had his clergy allowed, and was burnt in the hand. After argument at bar, Holt. Ch. J. at another day delivered the opinion of the court, wherein they all agreed that final judgment ought to be given; for though clearly the writ is bad for want of 15 days, between the teste and return, yet since he appeared and pleaded in chief he has lost that advantage; and judgment for the defendant upon the plea in bar.——2 Hawk. Pl. C. 185. pl. 101. says that the later authorities seem to incline that it ought to be abated, because the writ is the foundation of the whole proceeding; but that it has been resolved to be cured by the party's coming in and pleading in chief; and that it has likewise been adjudged that where the original is right, all defects in the mesne process are solved by the party's appearance.

17. In appeal of murder a *warrant of attorney* was offered for the appellant, but disallowed, because he must *count* in propria persona. Then the appeal was arraigned in French, and delivered in the roll in Latin, and it was *per attornatum suum*; but the appellant was present in court. The court held that if he had not been present, he might have been demanded and nonsuited; but it had not been peremptory, because it is only a nonsuit before appearance; and the court allowed the words *per attornatum* to be struck out of the roll, because it made the count agreeable to the truth, and the parchment is no record in court till filed. 1 Salk. 64. pl. 5. Pasch. 4 Ann. B. R. Loder's case

4 Mod. 99. Loder v. Snowdon, Pasch. 4 W. & M. in B. R. seems to be S. C. notwithstanding the difference of time. And there being a *leser* of *pledges*, and that

being returned by the sheriff, the appellant came into court and prayed that he might find sureties; that *quarto die post* the appellant appeared *per attornatum*, and then the defendant was arraigned; whereupon the defendant prayed to be discharged, because appellant cannot appear by attorney, and so it was no appearance, and consequently is a discontinuance of the suit upon record. The court took time to consider, and then the appellee was brought to the bar again, when the appellant was there in person, and sureties taken; but the filing the warrant of attorney was rejected. Per cur. The defendant upon the arraignment should have prayed that the plaintiff be demanded, and then, if he had not appeared in person, he should be nonsuited. He was not arraigned again, but the secondary read the record. The defendant prayed oyer of the writ and return, and after reading he moved that it might be entered, as it was; and that continuances from time to time might be entered, in regard he was going into the king's service, which was granted. Then he pleaded a conviction of manslaughter, which was insisted on to be a good plea in bar to an appeal of murder, &c. and had his clergy, &c. and prayed that his plea might be allowed. It was read by the secondary.——12 Mod. 21. Pasch. 4 W. & M. the S. C.

18. Where a *writ of appeal* is abated in B. R. the appellant may file a *bill of appeal* against him, as in *custodia mareschalli*, &c. and so it was done, and the appellee arraigned immediately upon it. And Holt Ch. J. relied on the case of Watts v. Brains, Cro. E. 694. 778. 2 Ld. Raym. Rep. 1290. Trin. 8 Ann. B. R. Smith v. Bowen.

S. C. & S. F. cited accordingly, Comyns's Rep. 260. Pasch. 3. Geo. 1. B. R.

in case of Reeves v. Trindle, in which case, because there was a misprison in the writ of appeal, wherein no addition of state, degree, or mystery was given to the defendant, it was prayed that the writ and proceedings thereon might be quashed; and that the defendant, who was before committed to the Marshalsea, might now be charged by bill, as in *custodia mareschalli*. And the court quashed all the proceedings on the writ, and the appellant (being an infant) was admitted by guardian to prosecute his appeal against the appellee in *custodia mareschalli*.

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## (P) Arraignment after Former Arraignment. And Pleadings.

1. **I**N appeal of death, *after declaration the plaintiff was nonsuited, and the defendant was arraigned upon the declaration, and said that of the same death, before this time, he was indicted and arraigned, and pleaded pardon of the king, which was allowed to him, and went without day; judgment, &c. and he shewed the charter and it was allowed again. Quod nota; and so see the plaintiff had appeal after the arraignment at the suit of the king, and the defendant was twice arraigned. Quod nota. Br. Appeal, pl. 33. cites 11 H. 4. 41.*

Br. Corone,  
pl. 48. cites  
S. C. —

2 Hale's  
Hist. Pl. C.  
249. cites

S. C. that Auterfoits acquit is no plea, because not brought by the right party.

Br. Corone,  
pl. 48. cites  
S. C.

2. If a man be killed, and the youngest son brings appeal, and the party is acquitted, he shall be arraigned a-new at the suit of the eldest son, and so life shall be twice in jeopardy. Br. Appeal, pl. 41. cites 21 H. 6. 28. Per Ascue.

Br. Corone,  
pl. 48. cites  
S. C.

3. So where he is acquitted in appeal brought by the heir he shall be arraigned again at the suit of the feme. Br. Appeal, pl. 41. cites 21 H. 6. 28. per Ascue.

1 Salk. 61.  
S. C. & S. P.  
but the ap-  
pellant is  
not to make  
a new  
count for  
the arraignment is no commencer but a revivor thereof like a re-summons.

4. In all cases where an appeal is commenced below and afterwards removed, it is necessary that the prisoner be arraigned *de novo* upon the same bill or appeal, and not to exhibit a new bill against him here in *custodia mareschalli*, &c. Per cur. Carth. 394. Hill. 8 W. 3. B. R. Lisle's case, [alias, Armstrong v. Lisle.]

## (Q) In what Cases the Appellee may afterwards be arraigned at the Suit of the King.

So if the  
plaintiff had  
been a ba-  
lard. Ibid.

— Contra if he had been an *Infant*. But during his nonage the appeal shall cease; and so see that an infant shall have appeal. Ibid.

1. **T**HE plaintiff in appeal brought as heir was barred because he was not next heir to the deceased, and the other arraigned at the suit of the king. Br. Appeal, pl. 53. cites 15 E. 2.

In appeal  
the plaintiff  
is nonsuited  
before ap-  
pearance and  
there is no

2. In appeal of robbery, if the plaintiff be nonsuited before appearance, and no mainour found, the defendant cannot be arraigned upon the appeal for the king, by which the justices wrote to the sheriff for the indictment. Br. Appeal, pl. 130. cites 1 Ass. 5.

Indictment, and therefore the defendant went quit; for in this case there is no declaration nor indictment upon which he may be arraigned. Br. Appeal, pl. 67. cites 27 Ass. 7.

[ 560 ] But if the plaintiff be nonsuited after appearance the defendant ought to be arraigned at the suit of the king, though he had been acquitted upon the indictment, and ought to have been put to plead auterfoits acquit; Per Holt Ch. J. Ld. Raym. Rep. 556. Pasch. 18 W. 3. in case of the king v. Toler.

3. A man killed a man who is outlawed of felony, there none may have appeal as heir; for the outlawry is corruption of blood, but he shall be arraigned at the suit of the king. Br. Appeal, pl. 131. cites 2 Aff. 3.

4. In appeal of robbery, excommunication was pleaded in the plaintiff, by which the defendant was let to mainprise from day to day; for by excommunication the suit of the party is not lost, nor can the king by this have suit, and so see that where the party would have appeal, the suit of the king shall not take it away. Br. Appeal, pl. 50. cites 3 Aff. 12.

5. In appeal, the writ was abated because habeas was wanting in the original, and the defendant went to prison, but was not arraigned at the suit of the king, because the court has no warrant when the writ is vitious. Br. Appeal, pl. 53. cites 13 Aff. 11. and 16 E. 3. accordingly.

Th 1. Dig. 94. b. 10. can 6. f. 4. cit. 13 Aff. 11. Bul. 13 E. 3. Corone 121.

S. P. accordingly. — Br. Corone, pl. 78. cites S. C. but says that Scott arraigned him for the king at Newgate. — S. C. cited Bulst. 142. and says that an appeal varies from all other proceedings, for there shall be no amendment of a writ of appeal; and says note, that in that case the defendant was not arraigned at the suit of the king, although the court was well apprised of the year and day; the reason of this there given, was that the court had no warrant so to do when the writ was vitious; and the court would not suffer the writ for to be amended; and the reason of this is because an appeal is the violent pursuing of a subject unto death, and therefore the same is to be taken strictly, and that in all respects in favorem vitæ.

2 Hawk Pl. C. 213, 214. cap. 25. f. 11. S. P. and says that he shall not be arraigned at the suit of the king upon the appeal, but shall be wholly discharged of it.

6. In appeal, the defendant pleaded outlawry in the appellor in trespass, and for that reason the defendant went quit without arraigning at the suit of the king, and note, that this appellor seems to be approver, who is arraigned and appealed others; for the plaintiff in writ of appeal is called appellant. Br. Appeal, pl. 57. cites 17 Aff. 26.

S P. though the plaintiff said that at the time of the outlawry he was imprisoned, by which he

said that he had writ of error now sealing thereof, & non allocatur. For after the outlawry reversed, or pardon obtained, the plaintiff may have other appeal. Br. appeal, pl. 118. cites Fitzh. Utlage 47. — Ibid. 146. cites 18 E. 3. and Fitzh. Utlawry 47.

7. If a man be killed who has no feme nor son, and his daughter, sister, or other cousin, who is a feme in his heir, and he has an uncle or other male cousin who is not heir but of the kin, she shall not have appeal, and therefore the appeal is lost, and upon such appeal the defendant shall not be arraigned at the suit of the king upon the declaration; for the appeal never was good, and yet damages were not given to the defendant, because it may be that he shall be thereof indicted and convicted at the suit of the king. Br. Appeal, pl. 68. cites 27 Aff. 25.

8. In appeal by infant, and upon inspection of age the parol demurred, by which the defendant was arraigned at the suit of the king upon indictment, and was compelled to plead, by which he pleaded Not guilty, and thereupon was let to mainprise till the suit of the party be determined. Br. Appeal, pl. 119. cites 32 Aff. 8. and T. 11 H. 4. 94. at the end.

9. It is said, that if a man be indicted and be arraigned of the indictment pending the appeal, the inquest shall not be taken till the suit of the party be passed by nonsuit, &c. For if he be once ac-



quitted he shall not put his life in jeopardy again for this offence; quod nota bene. Br. Appeal, pl. 12. cites 45 E. 3. 25. and 21 E. 3. 24. accordingly.

\* 10. Two are indicted of the death of a husband, the feme brought appeal against the *one who is acquitted by nonsuit after appearance of the other*, she shall not have appeal against the other, nor shall any other, by which he was arraigned at the suit of the king, and so see a stranger has advantage of the record, which is uncommon. Br. Appeal, pl. 139. cites 47 Ass. 7.

11. In appeal of robbery, the *defendant is convicted* and the *plaintiff pardoned the execution*, and the *king reciting the attainder pardoned the execution also*, and because *no felony was expressly pardoned it was disallowed*; and so it seems that by the *release of the party* the defendant is not excused against the king without pardon of the king; for where the plaintiff ceases his appeal, yet *he shall be arraigned upon the declaration for the king*. Br. Appeal, pl. 27. cites 8 H. 4. 22.

12. The plaintiff shall have appeal *after the arraignment at the suit of the king*, and the defendant was twice arraigned; quod nota. Br. Appeal, pl. 33. cites 11 H. 4. 41.

Br. Appeal,  
pl. 39. cites  
S. C. accord-  
ingly upon

an ill original. — But where he is arraigned upon *good original*, as good appeal or good indictment, and is acquitted, and the *misne process or return is ill*, there he shall not be at another time arraigned at the suit of the king. Br. Corone, pl. 35. cites S. C. & S. P. accordingly.

S. P. Br. Co-  
rone, pl. 29.  
cites 11 H. 4.  
41. and de-

14. Where the plaintiff is *nonsuited in appeal after declaration*, the defendant shall be arraigned upon the declaration for the king. Br. Appeal, pl. 44. cites 4 H. 6. 15.  
defendant pleaded *autrefois arraigned of this death upon an indictment*, and charter of pardon, and had thereof allowance; and the court agreed, that he might plead the first record and judgment of discharge, and vouch the record thereof; but if he pleads the pardon, he ought to shew it as it is said, and so he did, and pleaded it, and it was allowed though there was *variance in the name and day*; but what the variance was does not appear.

15. *Contra after the writ abated*, as by misnomer of the vill, the defendant shall not be arraigned upon the declaration for the king, for where the writ is abated, the declaration depending upon it is determined, and cannot remain; contra upon nonsuit, per Strange. Br. Appeal, pl. 44. cites 4 H. 6. 15.

See 2  
Hawk. Pl.  
C. 196. cap.  
23. l. 135.

16. But the defendant may say that the plaintiff has an elder brother alive, or that the deceased has a feme alive, and if, &c. to the felony Not guilty, but he cannot do so *where he is arraigned upon indictment at the suit of the king*, and upon these cases upon appeal so mistaken, if he be acquitted, he shall never be arraigned again at the suit of the king, but contra at the suit of the party, because he might have aided himself by plea before, and therefore volenti non fit injuria. Br. Appeal, pl. 41. cites 21 H. 6. 28. per Newton.

So if the son  
brings appeal  
of the death

17. If a *feme brings appeal of the death of her father* which is against the statute, and *he is acquitted*, yet he shall be arraigned again



again at the suit of the king, per Ascue. Br. Appeal, pl. 41. cites *of his father-who was outlawed, and*  
21 H. 6. 28.

the defendant is acquitted, yet he shall be arraigned again at the suit of the king, which Newton agreed; for it appears in the one case in the declaration, and in the other by the record of the outlawry; Quod nota. Ibid.

18. If the appeal be *not good*, and the *plaintiff be nonsuited*, the defendant shall not be arraigned upon it at the suit of the king, if it appears. Br. Appeal, pl. 5. cites 35 H. 6. 57, 58. per Markham. *Though the appellants be nonsuited, yet the king shall proceed upon it; and*

if the appellee be acquitted before, he must plead it, for we cannot take notice of it. 12 Mod. 374, 375 Pasch. 12 W. 3. in case of Stout v. Towler.

19. A man was indicted of *murder*, and after was appealed upon the same indictment, and for *variance between the indictment and the appeal* the plaintiff was nonsuited after declaration, by which he was arraigned for the king upon the declaration, and not upon the indictment. Br. Corone, pl. 195. cites 4 E. 4. 10. [ 562 ]

20. If in *appeal* brought in B. R. they are at issue, and *nisi prius* is granted, and at the day the plaintiff is *nonsuited*, they shall not arraign the defendant for the king upon the declaration as they shall do in B. R. for their power is only to take their verdict and record it. Br. Appeal, pl. 113. cites 22 E. 4. 19. per Fairfax J. *Contra of appeal commenced before the justices of nisi prius, there upon nonsuit they may arraign him upon the declaration. Ibid.*

21. *Where the party will not prosecute the suit*, the defendant shall be arraigned upon the declaration for the king. Br. Charter de Pardon, pl. 13.

22. Appeal of *burglary* against B. who was found guilty, and before judgment given the appellant died; It was moved, that judgment might be given for the queen upon that verdict, or at least that the declaration in the appeal should be instead of an indictment, and that the appellee be thereupon arraigned at the suit of the queen. Wray held, that if the appellant died before verdict, the defendant should be arraigned at the king's suit; but if his life be once in jeopardy by verdict, he conceived that it shall not be again drawn into danger; and some were of opinion, that the defendant should be arraigned at the queen's suit upon the whole record, and plead *auterfoits* acquit, and that they said was the surest way. 2 Le. 83. pl. 111. Hill. 28 & 29 Eliz. B. R. Brooke's case. *4 Rep. 39. b. 40. a. pl. 1. Vaux v. Brooke, S. C. where an exception was taken to the count, and resolved that if the count had been sufficient, then by his being convicted at the suit of the party he*

should not be *auterfoits* impeached at the suit of the king, but it was resolved that the count was insufficient by reason of the word (*Burgaliter*) for (*Burglariter*) and thereupon he was discharged. — 2 Hale's Hist. Pl. C. 251. cites S. C.

23. In an appeal upon the *death of her husband against several* defendants, who *pleaded several pleas, and several issues* being joined, the *plaintiff was nonsuit as to one* of them; The whole court held this to be a nonsuit against them all, and therefore as to the suit of the party it was ruled that he be discharged, but held, that the others who were not tried upon this appeal, shall be arraigned upon the declaration at the queen's suit. Cro. E. 460. pl. 6. Hill. 38 Eliz. B. R. Curtis v. Saville.

## (R) Against Accessories.

1. **A** Ppeal lies against the principal and accessory, and the receivers of the accessory, per Shard, and by assent of all the counsel the suit lies well; quod nota accessory of accessory. Br. Corone, pl. 104. cites 26 Ass. 52.

In appeal of maihem against several, the plaintiff counted against one as principal, and against others as accessories; the defendant demanded judgment.

2. In appeal of maihem, he counted that he *maihemed him feloniously, as a felon to our lord the king*, and yet this is no felony of death, the same law elsewhere of petit larceny, and there it is said, that in appeal of maihem the plaintiff may *choose to make each principal, or he who struck him principal, and the others accessories*, and it was adjudged before Knivet [Trin.] 42. and there it was said, that in the ancient law \* each shall be appealed as principal, but now he may choose; quod nota. Brooke says it seems the ancient law was the best; for it is only trespass in effect. Br. Appeal, pl. 72. cites 40 Ass. 9.

because all ought to be named as principals, and per cur. he may elect, so that the one count and the other is well enough, by which the defendant was put over. Br. Appeal, pl. 76. cites 41 Ass. 16.

\* [563]

And after, because the principals were arraigned and attainted upon the indictment at the suit of the king, and not at the suit of the party, therefore the inquest was spared, and the accessories were not tried at the suit of the party till the principals were convicted at the suit of the party. Br. Appeal, pl. 19. cites 7 H. 4. 27.

3. Appeal by a feme of the death of her husband against 5, viz. 2 as principals, and 3 as accessories, because they procured the two to kill the baron, and that the two were thereof arraigned coram rege, and they confessed and died in prison, and so were compelled to say, for otherwise the accessories shall not be put to answer if the principals are not attainted; and it is said there, that the principals were attainted at their own confession, and therefore it seems that the judgment was given upon the confession, but it does not expressly appear in the book whether judgment was given or not. Br. Appeal, pl. 19. cites 7 H. 4. 27.

4 Rep. 43. b. pl. Bibthe's case, alias, Goff v. Byby S. C. held accordingly per tot. cur.

4. Appeal of the death of a man lies not against any as accessories before the fact where the principal upon trial was found Not guilty of the murder but of manslaughter only. Mo. 461. pl. 645. Hill. 39 Eliz. Goose's case.

because there can be no accessory before the fact in manslaughter, because that must be on a sudden affray; for if it be premeditated it is murder. Cro. E. 540. in pl. 9. Goff v. Byby & al' S. P. accordingly.

Cro. E.

5. o. pl. 4. Hill. 39 Eliz. B. R.

5. But as to the accessories after the fact, they shall answer as accessories to the manslaughter. Mo. 461. pl. 645. Hill. 39 Eliz. Goose's case.

Goff v. Byby, seems to be S. C. held accordingly, for every appeal and declaration therein includes as well homicide as murder, which the common plea proves, viz. that he should answer to the felony and murder Not guilty.

6. In case of a principal and accessory in murder, the principal is attainted upon an indictment at the suit of the king, and outlawed thereupon. This attainder will not serve in an appeal to arraign the

the accessory, but the principal *ought to be attainted* upon an appeal before the accessory shall be arraigned upon an appeal. Jenk. 75. pl. 42.

## (S) Declaration. Of Declarations in General.

1. **NOTE**, that none shall be bound to answer to the appeal, unless the plaintiff *shews the name of the person killed*; but to indictment de morte ignoti, a man shall be compelled to answer. Br. Appeal, pl. 61. cites 22 Aff. 94.

2. Where a man is *struck in one county, and dies in another*, the appellant shall found his appeal upon the one act, and the other upon his case. Br. Appeal, pl. 7. cites 43 E. 3. 17. 18. 19.

3. Appeal by an infant of the death of his cousin, and it was challenged, because he *did not shew how cousin*; and it was held that he ought to shew it. Br. Appeal, pl. 12. cites 45 E. 3. 25.

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St. P. C. 81.

a. (A) S. P.

cites 45 E. 3. 21. and Fitzh. Corone 201. — 2 Hawk. Pl. C. 166. cap. 23. f. 43. S. P. and cites S. C. — Hale's Pl. C. 187. S. P. — See Bulst. 71. &c. Mich. 8 Jac. Egerton v. Morgan.

4. By which the plaintiff counted of treason, that the defendant killed his cousin traiterously, in his going with 20 men of arms to aid the king; per cur. *in common writ of appeal* he shall not count of treason. Br. Appeal, pl. 12. cites 45 E. 3. 25.

St. P. C. 78.

a. (C) cap.

20. S. P.

cites 45 E.

3. 21. [but

it is 45 E. 3.

25. a. pl. 36.]

5. Appeal by a feme of the death of her husband *against 3, the one as accessory and 2 as principals*, and the accessory appeared, and the others not, and she declared *against the 2 as principals, and against him who appeared as accessory*; for it is agreed that if appeal be *against 20, and one appears only*, yet the plaintiff ought to declare *against all, &c.* Br. Appeal, pl. 28. cites 9 H. 4. 1. 2.

4 Rep. 47.

b. pl. 12.

6. Exception was taken, that the appeal was *murdrum* instead of *murdrum*, and *Georius* instead of *Georgius*; but upon examination of the bill that was filed, it was right. It was moved to amend it, but objected that none of the statutes of amendments extend to appeals. But Holt Ch. J. thought there needed no amendment; but if there does, it may be amended; but as to the mistake of (Georius) for (Georgius,) that is in the fresh suit, which since the statute of Gloucester need not be set forth; for if an appeal be prosecuted within a year and a day, it is sufficient; and the court ordered the roll to be amended. 11 Mod. 231. Trin. 8 Ann. Smith v. Bowen.

Holt's Rep.

356. S. C.

Holt Ch. J.

held it a-

mendable

by the com-

mon law.

## (T) Declaration. By the Statute of Gloucester.

By this act the count of the appellant must comprehend these

1. *Stat. of Glouc. 6. E. 1. cap. 9.* **E**Naacts, That if the appellor declares the deed, the year, the day, the hour, the time of the king, and the town where the deed was done, and with what weapon, the appeal shall stand in effect, &c.  
 seven things, 1st, The fact. 2dly, The year. 3dly, The day. 4thly, The hour. 5thly, The time of the king. 6thly, The town where the fact was done. And lastly, with what weapon.  
 2 *Inst. 318.*—2 *Hawk. Pl. C. 179. cap. 23. f. 86.* says that no omission of any of these circumstances, where the law requires them to be expressly set forth, can be aided by the conviction of the defendant.

2. By the word (*deed*) must be set forth, first, *whether* it was by wound or without wound; if by wound, 4 things are necessary to be rehearsed in the setting out of the fact, besides the circumstances mentioned in the act, viz. 1st, *In what part of the body* the wound was. 2dly, *Of what length and depth* the wound was, where the wound is of such a quality, so as it may appear to the court that the wound was mortal; but if his arm were cut off, or the like, there the length or depth cannot be shewed. 3dly, *That the party died of that wound.* And lastly, that it may appear that he died of that wound *within the year and day* after the giving the wound; if without wound, either by weapon or without; if by weapon, *as by a blow or bruising, or by putting up a hot iron in the fundament,* or the like, then as many of the circumstances before-mentioned in the declaration of the fact as do agree therewith; and the rest of the circumstances required by the act are to be set forth, *if without weapon, or by poisoning, drowning, suffocating, strangling,* or the like, the manner of the fact must be set forth, and so many of the circumstances required by the act as agree therewith, namely all the circumstances, saving with what weapon the felony was done, because no weapon was used in committing of this felony; but notwithstanding this act extends to all homicides, though they were not done with any weapon. 2 *Inst. 318.*

[565] 3. Appeal against 3, and counted that the one struck the baron of the feme plaintiff in such a place of his body, of which he died, and if he had not died of it, another struck him in such a place, so that he had died if, &c. and that the 3d struck him in such another member, so that if he had not died of the first blow, he had died of this; and the defendants made defence, and pleaded Not guilty. *Br. Appeal, pl. 8. cites 44 E. 3. 38.*

*Fitzh. Corone, pl. 97. cites S. C.—St. P. C. 80. b. (C) cites S. C. [but is misprinted 44 E. 3. 33. instead of 44 E. 3. 38.]* and says that the statute of Gloucester, cap. 9. wills that he shall declare the fact, and that the count in appeal shall differ according to the difference of the fact; for the fact must necessarily be declared as it was done, or else as the law expounds it to be done; and therefore if two are present at the death of a man, and the one did not strike him, but commanded the other to do it, and he thereupon kills him; in this case, in an appeal against them, the plaintiff shall count that each of them struck him mortally, and cites *Mich. 21 E. 4. 84. and Fitzh. Corone, Hill. 4 H. 7. \* 60.*

\* The case in *Fitzh. Corone* is at pl. 60. and cites *Hill. 4 H. 7. 18.*—*Br. Appeal, pl. 85. cites 4 H. 7. 18. S. P.* accordingly, says that the words of the count being that each struck him mortally, are only words of form; for the blow of him who struck is the blow of him who commanded, if he was present.

So in appeal of rape against 2, where the one was present and abetted the other to ravish, &c. the count shall be that both ravished; for in law it was the ravishment of both. St. P. C. 80. b. 81. a. cites Mich. 11 H. 4. 12. and Fitzh. Corone 86 & 228.—Br. Appeal, pl. 32. cites 11 H. 4. 13. S. P. accordingly.

S. P. Br. Appeal, pl. 132. cites 40 Aff. 25. and says nota, that those that are present at the force and are aiders, though they do not strike, are principals.

4. In writ of appeal of rape the plaintiff counted *that where she was in peace of God and our lord the king, such a day, year, and place, there came the defendant feloniously, as a felon to our lord the king, his crown and dignity, & ipsam rapuit & carnaliter cognovit, by which she pursued from vill to vill, and from county to county, till he was taken at her suit, and that A. and B. were there enforcing and aiding of the same felony, &c.* and if the defendant would deny it, she is ready to prove as the court shall award, as a feme ought, &c. Br. Appeal, pl. 13. cites 47 E. 3. 14.

Appeal of rape of his feme, the writ was felonice rapuit, and not quod carnaliter cognovit, and yet well. Br. Appeal, pl. 32. cites accordingly.

11 H. 4. 13.—St. P. C. 81. a. (C) S. P. and cites S. C.—Hale's P. C. 187. S. P. —2 Hawk. Pl. C. 177. f. 79. S. P. accordingly.

5. Writ of appeal of rape of his feme, and the writ was *Ad respondendum to the plaintiff, secundum formam statuti of 8 R. 2. quare uxorem suam rapuit, unde eos appellat.* Strange demanded judgment of the writ; for no appeal of rape was given to the baron alone but by this statute; and the writ ought to be *Unde eos appellat secundum formam statuti*, and not *Ad respondendum secundum formam statuti*; for the answer was at common law, and the appeal is given by the statute. Per Hitl. Serj. The statute does not give appeal by express words; for appeal of rape was given before by the statute of W. 2. cap. 34. but see the statute that the king shall have the suit, and so because the statute aforesaid gives no appeal, he cannot say as Strange said, but he shall answer according to the statute; for the statute is *Quod ad duellum vadiandum non recipiatur*, and so the writ good. Br. Appeal, pl. 48. cites 1 H. 6. 1.

6. Yet Strange demanded judgment of the writ; for it is not *felonice rapuit*, and to the felony Not guilty, and the other e contra. Quære, because he answered to the felony. Ibid.

7. In appeal of maihem the plaintiff counted *Quod defendens ipsum mahemavit felonice.* Quod nota. Br. Appeal, pl. 86. cites 6 H. 7. 1.

[ 566 ]

Ibid. pl. 143. cites S. C.

and so it seems to be felony, as petit larceny; but not felony of death.

8. In appeal of murder an exception was, that it does *not say that the assault was vi & armis*, but says only *venit vi & armis & insultum fecit.* But Holt said that the vi & armis shall extend to all, and not only to the venit; and that this is not like the case of battery or trespass; for there there is a fine due to the king. 11 Mod. 231. Trin. 8 Ann. B. R. Smith v. Bowen.

Holt's Rep. 356. pl. 15. S. C. Holt held that the (et) couples all, and they are not laid as distinct acts.

9. Another exception was that the bill *set forth that the appellee, the said W. S. the deceased did strike and give him one mortal wound, of which the said W. S. did languish till such a day and then died,* and so the said J. B. as a felon, and of his malice aforethought, murdered the said W. S. in E. aforesaid. So that it does not ap-

pear

pear that the person died, for that it is not sufficient to say obiit, without repeating the nominative case. But per Powel J. the nominative case goes to the whole of necessity. Holt's Rep. 355, 356. Mich. 8 Ann. Smith v. Bowen.

See pl. (16) 10. By the word (*year*) is meant the year of the reign of the king. 2 Inst. 318.

\* 2 Hawk. Pl. C. 180. cap. 23. f. 83. says it seems most proper to allege it in such Manner.

11. The word (*day*) here is taken for the natural day, comprehending both the solar day and the night also, containing 24 hours, and therefore if it be done in the night it is said, \* *In nocte ejusdem diei*. 2 Inst. 318.

Hale's Pl. C. 207. S. P.— 2 Hawk. Pl. C. 180. cap. 23. f. 83. calls it a redundancy to allege the killing on the 10th of December, 12. If a man be feloniously stricken the 10th of December, whereof he died the 10th of January, he cannot allege the killing the 10th of December when the stroke was, but he may allege the killing to be the day that he died; but the surest conclusion is, and so he killed him in manner and form aforesaid; for though to some purpose the death hath relation to the blow, yet this relation being a fiction in law, maketh not the felony to be then committed. 2 Inst. 318.

and that such conclusion makes the whole naught; because the party could not be said to have been murdered till he was dead, and that in truth and propriety of speech (which must be observed in legal proceedings) it is not a felony but a trespass only till the death; but if in such conclusion it had been alleged that the defendant in such manner feloniously killed the party on the 10th of January aforesaid it had been sufficient, but that it is said the better way to conclude generally, that the defendant in such manner feloniously plundered the party.

At the sessions of the peace holden for the county of Norfolk, one SYER 13. And although the day be alleged, yet if the jury find him guilty at another day the verdict is good, but then in the verdict it is good to set down on what day it was done in respect of the relation of the felony; and the same law is in case of an indictment. 2 Inst. 318.

was indicted of burglary, Augusti 31 Eliz. and upon Not guilty pleaded, it fell out in evidence: that the burglary was done 1 die Septembris in eodem anno, so as primo Augusti there was no burglary done, and thereupon he was Not guilty, and afterwards he was indicted again 1 Septembris, &c. And it was resolved by Wray, Periam, justices of assize, and by the greatest part of the judges, that he ought not to be tried again, for he might have been found guilty upon the first indictment, for the day is not material; but it is necessary for the jury in that case to set down the day, and so in case of appeal. 2 Inst. 318. 319. cites Paich. 32 Eliz. Syer's case.

2 Hawk. Pl. C. 181. cap. 23. f. 88. at the end, says it is certain that a mistake of the day will not be material upon evidence.

\* [567] 14. As to the word (*hour*) the statute of Gloucester makes it material; for in the day are several hours, and if he that is killed was, at the hour supposed at a place 20 miles distant from where the felony was done, how can he be the principal actor of this felony? And yet it may be true that he was there the same day, though not the same hour; \* but as Bracton said, it seems the plaintiff is not necessarily compelled to express the hour in the declaration by the common law, and a man may now declare in this manner notwithstanding the statute of Gloucester, since the statute does not prohibit it, it being in the affirmative. St. P. C. 80. b.

(B)

There are divers diversities between the alleging of the hour, and the day or year. 1st. in the count upon the appeal one may say, Circa horam 10 ante meridiem, &c. &c. or, inter horam decimam & undecimam ante meridiem; but the like cannot



cannot be done either of day, year, or part of the body; as the fact cannot be alleged to be done *Circa 10 diem Decembris, &c.* or *inter decimum & 11 diem Decembris*, or *circa annum sextum domini regis nunc*, or *inter sextum & septimum diem domini regis nunc*, or allege the wound to be given *circa* or *cir-citer* pectus; and the reason of this diversity is, that it is more difficult to allege the true hour, than the true day or year; and yet the plaintiff in the appeal is *not bound to prove in evidence* neither the precise hour, nor the very day he alleged in his count; another diversity is between the appeal and the indictment, for in the indictment the hour need not be alleged. 2 Inst. 318.

2 Hawk. Pl. C. 180. cap. 23. §. 88. says, There can be no doubt but every count must allege the day on which the fact was done; but it is said not to be sufficient to allege it done *about such a day*, or *between such a day and such a day*, or *on the feast of such a Saint*, without an addition, if there be another of the same name, as *on St. John's day*, without adding *Baptist* or *Evangelist*; or *on an impos-sible day*, as *the 31st of June*. Also an appeal of death must *not only shew the day of the hurt, but also of the death*, that it may appear that the party died within the year and day after the hurt. And it is said not to be sufficient to allege that the defendant assaulted the party at a certain day, and feloniously struck him, without expressly alleging, that he struck him *Ad tunc & ibidem*, and yet both sentences being joined with the copulative, it is the most natural import of the whole that the stroke and assault were both at the same time, &c.

2 Hawk. Pl. C. 180. cap. 23. §. 87. says, that it is observable that all the precedents of such counts (excepting only one) in appeals of larceny in Rastal's Entries, which seems to be the only book of authority in which any such counts are to be found; and also all the precedents in Coke and Rastal of such counts in appeal of *maibem* take notice of the hour, as well as those in appeals of death, and therefore certainly it is not safe wholly to omit it; yet it has been holden that such an omis-sion is not fatal, even in appeal of death, because the common law did not require the mention of the hour, and the statute abovementioned is in the affirmative; yet if the hour as well as day be set forth in the allegation of the offence of the principal, it is said to be fatal to mention the day only in the allegation of the offence of the accessory. But it seems that there is no necessity in any case precisely to allege that the fact was done such an hour, but that it is sufficient to say, That it was done about such an hour, as appears from every one of the precedents in Coke and Rastal, in which the hour is mentioned, and also from other good authorities; yet we find the contrary opi-nion holden by 3 judges against 2 in \* Bullstrode's Reports. But it seems certain that a mistake of the hour will not be material upon evidence.

\* Bullst. 82. Mich. 8 Jac. in case of Egerton v. Morgan.

15. In appeal of murder exception was taken to the bill, be-cause it was laid to be done *Post meridiem circa horam decimam ejusdem diei*, whereas if it was done in the night it ought, by the statute of Gloucester cap. 9. to be alleged to be done *in nocte ejus-dem diei*, though it be in July, when it is not dark at 10. But Holt Ch. J. held it well enough in murder, though in an indict-ment for burglary it would be ill without (in nocte) because it is not burglary, unless it be in the night. 11 Mod. 230. 231. pl. 3. Trin. 8 Ann. B. R. Smith v. Bowen.

16. As to (the time of the king) the year being already named, 2 Hawk. Pl. C. 181. cap. 23. §. 90. it might seem that the time of the king, which is the year of the reign of the king is needless, but it is here again added to the end that *not only the year shall be alleged wherein the blow, &c. was given, but also the year when the death ensued thereupon*, to the end that it may appear that he died of the blow, &c. within the year and day; and whensoever the year of the king ought to be alleged, it draw-eth with it time and place, that is, the day and time, when and where the death ensued, 2 Inst. 319.

done, and that in appeal of death it is certainly necessary to set forth not only the year in which the stroke was given, but also that in which the death happened, that it may appear that the death happened within the year and day after the stroke; but that it seems clear from all the precedents, that it is sufficient to shew in what year of the king's reign the fact was done, and the death hap-pened, without shewing the year of the lord; and that it hath been adjudged that it is sufficient to allege the fact in such a year of such a king, without saying that it was in such a year of his reign, because it is clearly implied.

17. As to the words (the town) this must be understood, if the [ 568 ] murder or homicide were done in a town, but if it were done in a place If the act be

done in a will it shall be expressed in a will, but if it be done in a parish or so-  
 place known out of any town, then may it be alleged in that place known in such a county. And so in a city it may be alleged in a parish, &c. because such a parish is in lieu of a town. But in the country if a parish contained divers towns, the murder or homicide cannot be alleged in such a parish, for that the statute requireth that the fact be alleged in a town. 2 Inst. 312.

which is, out of any will, there it shall be named in a parish, or in such a place. Quod nota. Br. Appeal, pl. 19. cites 7 H. 4. 27.

2 Hawk. Pl. C. 182. cap. 23. s. 92. says that it seems not only necessary in appeal of death to allege some place where the fact was committed, but also that such allegation be in proper place; and that if the truth will bear it it is safest to lay it in a town, as the statute of Gloucester directs, but if done out of a town, you may lay it in any other place whence a viñe may come. If a fact done in a will within a parish which contains divers wills be in the count in an appeal alleged generally in the parish, or a fact done in a city which contains divers parishes be in the count in an appeal alleged generally in the city, it seems the defendant may plead such matter in abatement, for otherwise he could take no advantage of the insufficiency of the allegation, because the place named as it stands on the record, must, till the contrary be shewn, be intended to contain no more than one town or parish.

St. P. C. 80. b. (B) S. P. and it is not good to say at the place aforesaid; for in such case a man does not know  
 18. Appeal of murder against several of several vills that they at D. murdered the baron of the feme plaintiff, and because he shewed what each did severally there, and because they were several vills, therefore was compelled to shew the name of the vill at every time when the murder is alleged, by reason that there were several vills rehearsed supra; quod nota; and the defendant was let to mainprise. Br. Appeal, pl. 110. cites 21 E. 4. 25.

which of the places aforesaid it refers to; and cites Pasch. 21 E. 4. 30. [but it seems misprinted, and that it should be 21 E. 4. 25. b. pl. 41. where the S. P. is, but I do not observe S. P. at 30.]

4 Rep. 42. b. pl. 6. S. C. accordingly.  
 19. In appeal of death where the stroke was given at A. and the death happened at B. the declaration must be of murdering the deceased at B. For it is no felony till his death, which was at B. and thence the venire shall come. But if the stroke had been alleged at A. and the death at B. and then the declaration had said, *Et sic murdravit modo & forma prædicta*, it had been good. And though the precedents as to the alleging the place of the murder are where the stroke was, yet they passed sub silentio, and were not well examined and not to be regarded, and adjudged that the appeal did abate. Cro. E. 196. pl. 13. Mich. 32 & 33 Eliz. B. R. Hume v. Ogle.

Holt's Rep. 356. S. C. says that it was laid that the deceased was in the peace of God in East Smithfield, and there are 2 or 3 places  
 20. Another exception was that no place is set forth where the stroke was given; for it is said *die & loco prædicti. insultum fecit*, and says that is mentioned before where the pledges lived, and afterwards where venit vi & armis, so that prædict' may refer to the place before-mentioned, viz. where the pledges lived; and so no venue laid to the assault; but Holt held the (prædict') good, because the place mentioned where the pledges live is no part of the appeal. 11 Mod. 231. Trin. 8 Ann. B. R. Smith v. Bowen.

named, and then it is said that in loco prædicto he did not give the blow the year day and hour aforesaid, and objected that if there was one particular place, then (in loco prædicto) would refer to that, but when there are several, then (loco prædicto) is uncertain; and Holt held it well enough, for the reason mentioned in 11 Mod.

And albeit this statute  
 21. As to the words (with what weapon the wound was given) albeit

albeit one certain weapon must be alleged in the count, yet upon the evidence, if it be *proved* that the wound was given *with any other weapon*, the offender shall be found guilty; as if it be *alleged* in the indictment that the wound was given *with a dagger*, and it is *proved* in evidence \* that it was given *with a sword, rapier, hook, batcket, bill*, or any like weapon with which a wound may be made; for it were unreasonable to drive the plaintiff in the appeal to prove the self-same particular weapons, whereof many times he cannot have notice; but upon such a count, or an indictment in evidence it cannot be proved, that the party was poisoned, or drowned, or burnt, suffocated or strangled, or the like, where no weapon was used; for that evidence doth maintain the count in the appeal or indictment, because it is murder or homicide of another kind, and not under the same classis that is alleged in the count or indictment, and thereof the plaintiff by such as viewed the body may have notice. 2 Inst. 319.

requireth that it be alleged in the count of the appeal with what weapon he was killed, is to be understood in case where he is killed with a weapon, for albeit (as hath been said) there was no weapon at all, and in case of poisoning,

*drowning, &c.* yet doth the appeal lie for such homicide; and weapon is in this act mentioned for example. 2 Inst. 319.

22. Appellant counted that the defendant in parochia St. Giles in the Fields, &c. on such a day circa horam primam, &c. did assault, &c. and in & super superiorem partem of his belly near his breast, and the middle part of his body percussit, pupugit & inforavit, dans ei vulnus mortale, &c. The defendant cravedoyer of the writ and return, and then demurred in abatement, and pleaded over to the felony; the court ruled \* *circa horam primam* is certain enough, for the law will not tie a man up to an exact minute; that *in & super superiorem partem, &c.* could not be more certain; and that *percussit, pupugit & inforavit, dans ei mortale vulnus* was better and more certain than if it had been (*& dedit;*) and that the fact is well alleged *in parochia* though the stat. of Gloucester requires that a vill should be set forth, for it shall be intended a vill, and though there may be more vills than one in the parish, yet that shall never be supposed, but must be shewn by the other side. 1 Salk. 59. 60. pl. 2. Trin. 6 W. & M. in B. R. Wilson v. Laws.

This and the following plea relate to more than one single point of those before mentioned in this letter. 4 Mod. 290. S. C. and S. Points resolved accordingly. —Comb. 293. S. C. and the demurrer was over-ruled. —Carth. 331. S. C.

resolved accordingly. —Skin. 443. pl. 2. S. C. adjournatur. Ibid. 549. pl. 11. the court over-ruled all these exceptions. And ibid. 551. pl. 2. S. C. and judgment given accordingly. —Ld. Raym. Rep. 20. S. C. adjudged accordingly.

\* As to the *circa horam primam*, the court said that though in *EOERTON AND MORGAN'S CASE* [Rulst. 77. 80. &c.] three judges were of a contrary opinion, [viz. that it was not good;] yet even there, Coke and Williams held that it was certain enough, and the reasons of those two judges seem to be better warranted than the opinions of the other three, and that so have the precedents been ever since that time.

23. In appeal of murder, the appellee being found guilty, it was moved in arrest of judgment, 1st. That *two places* are mentioned in the appeal, viz. *That he was commorant at Shalford, and that the fact was done at Compton*; afterwards it says, that *die, anno, hora, & loco præd' eandem Jane Young percussit*. 2dly, There is no venue laid to the assault, for it is said, that the deceased being at Compton, &c. *venit præd' Christop' Slaughterford felonice voluntarie & ex malitia sua præcogitata ut felo dictæ dominæ reginæ nunc,*

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nunc, ac contra pacem, &c. die & hora præd' apud C. præd', &c. vi & armis, &c. ac in & super eandem J. Y. in pace dei & dictæ dominæ reginæ ut prefertur existen' felonice, voluntarie & ex malitia sua præcogitata insultum fecit; so that the venue is only laid to the venit vi & armis, for the (ac) separates the sentence; and if an assault be necessary, it is necessary to lay a venue, for it is traversable, and that it should have been *tunc & ibidem insultum fecit*. At first Holt Ch. J. Powis and Gould justices were clear that neither exception was good, but Powel doubted, and the matter being put off to the next day, Holt was of opinion, that neither exception was material; as to the first, when one place is the man's addition, and the other the fact, certainly die, hora & loco præd' shall refer to the place of the fact, and it is as well as if it had been (*eodem*,) for the place of the fact is the last before the præd'. As to the other exception it is not material, for the assault is not necessary, for percussit is a sufficient assault; as to LONG's case, where percussit was omitted, that was shewing the consequence without the cause; *percussit implies an assault*, but if it did not, here it is said, *venit vi & armis to Compton, ac insultum fecit, &c. ac eam quodam baculo, &c. percussit, dans eidem J. Y. unum mortale vulnus, de quo quidem vulnere instanter obiit*, so that if the assault was necessary in the venue here it would be sufficiently set forth. Powel said, as to the first exception the precedents are die, hora & loco præd', but in an appeal there needs no addition, for it is not within the statutes of additions; and it being said, *apud Compton instanter obiit*, ties down the stroke to the place of the death. As to the 2d he said, that *dedit mortale vulnus* would be bad, but in this case there cannot be a stroke without an assault. The old precedents are *insidiando & ex insultu*, but upon the petition of the clergy, because it took away the benefit of the clergy in H. 6th's time, it was left out, and afterwards it was only *ex insultu*. In BURGH AND HOLCROFT's CASE there is no assault laid, and indeed where there is percussit, as in this case, there needs none. Powis and Gould the same. 11 Mod. 229, 230. pl. 2. Trin. 8 Ann. B. R. Young v, Slaughterford.

### (U) Of Pleading in Abatement, and then over to the Felony, &c.

Thel. Dig.  
216. lib. 15.  
cap. 5. s. 18.  
cites S. C. &  
S. P. ac-  
cordingly.

1. **I**N appeal by a feme of the death of her husband, the defendant said, that at another time the feme brought appeal against others of the same death before justices of gaol delivery in the county of N. who at her suit were attainted and hanged, and prayed allowance, and to the felony Not guilty, and so see that he ought to plead over to the felony. Br. Appeal, pl. 28. cites 9 H. 4. 1. 2.

S. C. &  
S. P. cited

2. The defendant pleaded villeinage in the plaintiff, and was compelled

compelled to plead *over to the felony*. Br. Appeal, pl. 28. cites according-ly. Thel. Dig. 216.

lib. 15. cap. 5. S. C. and says that the same is reported Trin. 11 H. 4. 23. [but it seems it should be 93.] and Mich. 9 H. 4. 1. — Brooke makes a quere if it is a good plea in appeal of murder that the plaintiff is the defendant's villain. Br. Nonability, pl. 44.

3. Alice T. sued appeal against W. S. and R. in B. R. of the death of J. T. baron of the plaintiff, and declared against W. as principal, and against R. as accessory in the county of W. Cotton for W. made defence, and said, that at another time the same plaintiff attached the appellee of the same death against W. before A. B. coroner in the county of W. in full county such a day and year, which was removed out of the county into B. R. by writ directed to the sheriff, and upon this process continued here till such a day, within which time this appeal was purchased, and so this appeal purchased pending the other, &c. and where W. is named of D. in the county of W. there is no such vill, hamlet, nor place known by such name, and prayed allowance, and as to the felony Not guilty, and for R. he said, that where he was named of W. he was of C. in the county of M. the day of the writ purchased, and not at W. and prayed allowance, and as to the felony Not guilty; per Hals. J. he shall not have those 2 pleas to the writ, viz. that the appeal is purchased pending another, which is matter in law and triable by the justices, and also that there is no such vill, &c. which is triable by the country, but he may plead *misnosmer of himself*, and also that there is no such vill, &c. and such like which are triable by the country if he will aver 20 such matters; and after the *misnosmer* of the vill was confessed, by which it was awarded that the plaintiff shall take nothing by her writ, and that she shall be taken; quod nota. Br. Appeal, pl. 44. cites 4 H. 6. 15.

Thel. Dig. 215. lib. 15. cap. 3. f. 18. cites S. C. & S. P. accordingly.

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4. In appeal of the death of T. his brother, the defendant said that B. took to feme C. at B. in the county of S. &c. and had issue J. the eldest son, and T. who is dead the 2d son, and this plaintiff the youngest son and T. is dead, living J. and prayed allowance, and to the felony Not guilty; per Markham, he need not plead to the felony, but where it is confessed that he had title of appeal at one time, as where a release is pleaded, but shall not plead over, &c. where he alleges matter which proves that the party never had title to the appeal as here, \* and where he pleads *bastardy*, or *Ne unques accouple*, &c. which Yelverton agreed, and that where he pleads to the felony he confesses the plaintiff to be such person as may have the appeal, and the other matter proves the contrary; but by the serjeants he may plead over to the felony in favour of life to have it inquired, if the first matter be not found for him, by which he had the plea by the manner after; quod nota. Br. Appeal, pl. 94. cites 7 E. 4. 15.

\* S. P. by some, because if it be certified against him he shall be hanged, which Brian and Catesby denied, saying that the felony shall be inquired after the certificate of the bishop, &c. Br. Appeal, pl. 101. cites 14 E. 4. 7.

5. In all cases of pleading *misnosmer* he must plead over to the felony. 2 Hale's Hist. P. C. 238. cap. 30. cites D. 88. a. b. and 21 E. 4. 71. a. b.

6. Appeal of death in B. R. Vavisor said, where the plaintiff has declared that the defendant killed the deceased the first day of May

Thel. Dig. lib. 15. cap. 5. f. 20.



cites 22 E.  
4. 38. S. P.  
according-  
ly, and held  
good.

May 21 E. 4. we say that he *died* the 10th day, anno 18 E. 4. which is 2 years before the appeal sued, and if found that it be not, then to the felony Not guilty, and the plea good, by all the justices, in favour of life. Br. Appeal, pl. 115. cites 22 E. 4. 39.

7. And after the defendant pleaded, *that where it is supposed that he died the 21 E. 4. he died 18 E. 4. and this, &c.* Husley said, it is best to plead that the deceased died anno 18 E. 4. &c. before the appeal, and plead over to the felony, and then if the jury find the time they shall not inquire any further, and if e contra, then they shall inquire of the felony, and we are all agreed that if he pleads the first plea only, and it is found against him, he shall plead to the felony after, and so 2 inquests where one may make an end of all, and the opinion of the court was, that the plea was good, without traverse that he was alive within the year and day. Br. Appeal, pl. 115. cites 22 E. 4. 39.

8. But after the defendant of his own free will alleged the death anno 18 &c. *absque hoc* that he was alive within the year and day before the teste of the appeal, Prist. &c. and the other e contra, and to the felony Not guilty, and the other e contra. Br. Appeal, pl. 115. cites 22 E. 4. 39.

Thel. Dig.  
216. lib. 15.  
cap. 5. f. 20.  
cites S. C.  
and 7 E. 4.  
15. S. P. by  
Husley.

9. And per Husley, he shall plead *bastardy*, and if, &c. Not guilty, and in appeal by a feme, *Ne unques accouple* in lawful matrimony, and if, &c. Not guilty, *contra* of a release, for there he has in a manner confessed the felony. Br. Appeal, pl. 115. cites 22 E. 4. 39.

10. In appeal by the brother and heir, &c. the defendant said, *that the plaintiff had an elder brother, &c.* and as to the felony Not guilty, and held good. Thel. Dig. 216. lib. 15. cap. 5. f. 20. cites Mich. 7 E. 4. 15.

Bulst. 141.  
S. C. the  
appeal was  
quashed,  
and the de-  
fendant dis-  
charged.—  
Cro. J. 283.  
pl. 4. S. C.  
and the ob-  
jection  
was that he  
should have  
defended  
feloniam &  
homicidi-  
um and con-  
cluded to  
them, and  
not feloni-  
am & mur-  
drum, sed  
non allocat-  
ur, and the  
defendant  
was dis-  
charged.

11. In appeal of death, the defendant pleaded a former conviction of manslaughter before justices at York for the same fact, and had his clergy, and that no judgment was given upon the premisses, and took all the material averments, &c. and as to the felony and murder aforesaid pleaded Not guilty. It was moved that the plea was not good, because after pleading the conviction upon the indictment he pleaded to the felony and murder aforesaid Not guilty, which is no answer to the \* declaration which supposes the fact to be homicide only, and not murder. But resolved that the plea is good, because Ex necessitate juris the defendant need not plead to the country at all where he has pleaded a good special plea to the country before; for this plea to the country added to the other plea is only in favorem vitæ, and the defendant may hazard his life upon the first plea, if he will, and here the pleading the conviction and clergy allowed is a good bar; that the word (*murdrum*) in the plea is idle, and the word (*feloniam*) is the principal word, and refers the plea to the felony supposed in the declaration. Beside, the word (*murdrum*) here must be taken for homicide; for though the indictment or appeal says the defendant *murdravit*, yet if there be no *malitia præcogitata* it is only manslaughter, and the word (*murdravit*) of itself is equally applicable to manslaughter as well as murder. Yelv. 204. Pasch. 9 Jac. B. R. Bradley v. Banks.

\* [ 572 ]



12. In appeal of murder, the defendant pleaded in abatement of the writ that there was *no such parish* known by such name as that of which he is named. The appellant demurred, because this plea being in abatement the defendant ought to have pleaded over to the felony. But the court held it well enough; for that it is good either way, and that the precedents are both ways and judgment for the defendant. Show. 47. Trin. 1 W. & M. Orbell v. Ward.

1 Salk. 59. pl. 1. Orbell v. Ward, S. C. but S. P. does not appear. — Comb. 139. S. C. and Holt, Ch J. said that the

plaintiff ought to have moved that the defendant might have pleaded over, but that that is a distinct plea, and does not vitiate the plea in abatement, and if the plea over be necessary, the plaintiff should have taken judgment for want of it; and Dolben J. agreed, but he was of opinion, that if the defendant pleads over to the felony at the same time that his plea in abatement is over-ruled, it is sufficient, and that so it was resolved in parliament 10 years ago. Adjudged for the defendant. — Carth. 54. S. C. and it was admitted, that it was usual to plead over to the felony in such cases, but said that it was not necessary that for the default thereof the other plea should be ill; for it is but reasonable that the defendant in this case, whose life is concerned, should have the same privileges that all other defendants have in civil actions; and cited Br. Appeal pl. 66. and Co. Ent. Tit. Appeal. — 3 Mod. 266, 267. S. C. and per cur. if the plea is in abatement, and the party does not answer to the murder, yet that does not oust him of his plea but the appellant ought to have prayed judgment, and it is a question whether he ought to plead over to the felony or not for the precedents are both ways. There is no judgment entered.

For more of this see 2 Hale's Hist. Pl. C. 255. cap. 33. and 2 Hawk. Pl. C. 196. cap. 23. f. 135. with his observations on the several pleas pleaded in abatement.

## (W) Pleadings. What is a good Plea in Bar.

1. **A** Ppeal at Newgate, the *defendant said, that the plaintiff is extra legem*, and ought not to be answered; for he *has abjured the realm*, and this is found in the roll of the coroner, by which he was hanged; and the defendant went quit. Br. Appeal, pl. 52. cites 11 Aff. 27.

Br. Nonability, pl. 22. cites S. C. and H. 17. accordingly.

2. In appeal of the death of his brother, the *plaintiff was disabled by outlawry*, by which he brought writ of error to reverse the outlawry, because he was in prison at the time of the outlawry, and notwithstanding this, the *defendant went quit* without being arrested at the suit of the king, and no mischief, for when he has *sued his charter of pardon, or reversed his outlawry, he may have a new writ, but contra after nonsuit after appearance*; quære of the new writ after the year, and so see that the disability by outlawry in appeal is not peremptory; contra of nonsuit after appearance. Br. Peremptory, pl. 80. cites 18 E. 3. and Fitzh. Utlawry 47.

3. Appeal by a feme of the death of her husband, the *defendant said, that at the time of the death the baron was outlawed of felony; judgment, &c.* Per Shard. a man cannot kill a man outlawed of felony no more than another man by which he pleaded Not guilty; but Lod. said, that H. of C. was for such cause excused of the death of the baron of Woodhulk. Br. Appeal, pl. 69. cites 27 Aff. 41.

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4. In appeal by feme of the death of her husband, the *defendant said that Ne unques accouple in lawful matrimony. This shall be tried*

• S. P. Br. peremptory, pl. 67.

cites S. C. and says that he cannot plead over at the

*by certificate of the bishop, and is not \* peremptory against the defendant; for the bishop certified that lawfully accoupled, &c. and the defendant pleaded Not guilty. Quod nota. Br. Peremptory, pl. 32. cites † 27 Aff. 3.*

first; and Brooke says the reason seems to be, because it demands two trials.——S. P. accordingly, and for the same reason; but he may plead not guilty afterwards, and this in favour of life, as it seems. Br. Appeal, pl. 17. cites 50 E. 3. 15. —Thel. Dig. 216. lib. 15. cap. 5. f. 20. cites Mich. 7 E. 4. 15. where it is said that *Ne unques accouple* may be pleaded, without pleading to the felony; but Hussey said that in this case the defendant may plead over to the felony.

In an appeal of murder by the wife, the appellee pleaded *Ne unques accouple* in lawful matrimony, and if found, &c. then *Not guilty to the felony*. The plaintiff replied *lawfully accoupled &c.* but did not reply *that he was guilty of the felony*. It was moved that this was a *discontinuance*; but per cur. when a plea is pleaded which is triable at common law, and concludes over to the felony, there the plaintiff ought to reply, and conclude over to the felony; but where he pleads a plea, triable otherwise than by the common law, it is otherwise. Cro. E. 223. 224. pl. 6. Pasch. 33. Eliz. B. R. Withington v. Dalaber.——3 Le. 268. pl. 360. Witherington. v. Debbar, S. C. held accordingly.

† S. P. Br. Appeal, pl. 66. cites S. C. and ibid. pl. 101. cites 14 E. 4. 7. S. P. and by some he shall not plead over to the felony, because if it be certified against him, he shall be hanged. But Brian and Catesby denied it, and said the felony shall be inquired after the certificate of the bishop, &c.

S. P. per Tremain J. Br. Peremptory, pl. 41. cites 6 H. 7. 1.

5. The *praying of the defendant that the stroke in appeal of maihem be examined* is peremptory, if it be found against him upon the examination. Br. Peremptory, pl. 33. cites 28 Aff. 5.

But Brooke says the contrary was held in Gray's-Inn.

S. P. Br. Appeal, pl. 154. But Brooke says quod mirum; for in Maihem there is no accessory.

6. In appeal of maihem against *A. as principal, and D. as accessory*, it is a good plea that at another time he brought such appeal against them, and named *D. principal, and A. accessory*, contrary to this writ, and after was *non-suited* after appearance, judgment if, &c. by which Knivet awarded that he take nothing, &c. and that he be taken &c. Br. Appeal, pl. 71. cites 40 Aff. 1.

7. In appeal by a feme of the death of her husband, the defendant said that the baron was alive at *D. in the county of C.* and the other e contra; and day was given to bring in the proofs. Quære of trials by proofs at this day. Br. Appeal, pl. 133. cites 41 Aff. 5.

8. In appeal of maihem the defendant pleaded that *de son assault demesne, and in defence of the defendant*, and the defendant said that *De son tort demesne* without such cause, prist; and the others e contra. Br. De son tort, &c. pl. 47. cites 41 Aff. 21.

9. In appeal by feme of the death of her baron, the defendant said that the baron is yet alive, and the feme e contra; by which they were awarded to bring in their proofs, and because the proofs were faulty, therefore to avoid perils the defendant pleaded Not guilty. Quære if it be peremptory, if the proofs are adjudged against the defendant. Br. Peremptory, pl. 36. cites 43 Aff. 26.

10. It seems that an acquittal or attainder of the same death, had been a good bar in the appeal. Br. Appeal, pl. 33. cites 11 H. 4. 41.

11. Contra of charter of pardon allowed, as it seems here. Ibid.

12. If a man be arraigned upon an indictment he shall not plead *miseria*,

*misnomer*, but plead Not guilty, and give in evidence that he is not the same person, but if he be the same person, then no matter for the misnomer. \* But *contra in appeal*; for there misnomer is a good plea, and if he be outlawed upon misnomer, it seems to be error. Br. Corone, pl. 201. cites 1 H. 5. 5.

13. Brooke says, it seems that he shall not plead over to the felony, but where the plea to the writ is triable per pais. Br. Appeal, pl. 48. cites 1 H. 6. 1.

14. In appeal of death by writ in B. R. the defendant pleaded in abatement of it, that the plaintiff had brought appeal before the coroner and sheriff in the county of the same death, which was removed by writ directed to the sheriff in this court, and process continued here till such a day within which time his appeal was purchased, judgment, &c. And because it was removed by writ to the sheriff where it should be to the coroner, for he is judge, &c. therefore it was taken that that which was removed here was not of record here, and so no plea by which the defendant passed over. Quod nota, that it is no plea that the plaintiff has 2 writs pending in one and the same court, as here; for it is false if the removing be void, and it may be that the writ before the coroner is discontinued. Br. Brief, pl. 209. cites 4 H. 6. 15.

15. In appeal the defendant said that the plaintiff purchased other appeal before, returnable such a day; judgment of the 2d writ of appeal and no plea, per cur. if he did not appear to the first appeal; for it may be that a stranger has entered it, and here the first writ was delivered of record, &c. yet cur. held ut supra. Quod nota. Br. Appeal, pl. 87. cites 7 H. 7. 6.

16. If the king pardons or releases the appeal, it is no bar to the plaintiff in the appeal. Br. Appeal, pl. 41. cites 21 H. 6. 28.

17. In appeal by the heir of the death of his ancestor, it is a good plea, per 3 justices, that the defendant joined battail with the ancestor before the constable and marshal, because the ancestor called the defendant traitor, and he vanquished him to death, judgment, &c. and this matter shall be certified. Br. Appeal, pl. 129. cites 37 H. 6. 19. 20.

Br. Corone, pl. 57. cites S. C. —  
Br. Trespass, pl. 197. cites S. C. —  
Br. Battail, pl. 15. cites S. C. but not exactly S. P.

18. A. brought appeal of the death of T. his brother. The defendant said that the same T. at the time of his death, and after the day of the writ purchased, had an elder brother J. to whom the appeal is given, and not to the plaintiff. Per Markham Ch. J. he ought to commence his plea to the blood, viz. from the father of him who is dead; for it may be that J. and T. were brothers of the half-blood, to which Laten and others agreed. Br. Appeal, pl. 94. cites 7 E. 15.

Fitzh. Corone, pl. 28. cites S. C. —  
St. P. C. 60. b. (E) S. P. and cites S. C. —  
S. C. cited 2 Hawk. Pl. C. 165. cap 23. s. 40.

19. In appeal the defendant pleaded excommunication in the plaintiff, by which the defendant went without day till the plaintiff was absolved. And so see that this shall not abate the writ. Br. Appeal, pl. 142. cites 13 E. 4. 8.

Br. Appeal, pl. 50. cites 3 Aff. 12.

By the stat.  
3 H. 7. cap.  
1. *Auterfoits*  
acquitted, or  
attaint upon  
an indictment  
of murder  
or man-

slaughter, is no bar of an appeal for the same death; ~~but~~ *auterfoits* convicted of murder or manslaughter, and *clergy* had upon an indictment, is a good bar to an appeal, notwithstanding this statute; for indeed the statute itself has this exception, viz. "The benefit of the clergy not being had." 2 Hale's Hist. P. C. 250. cites 4 Rep. 45. b. Wiggs's case; and this though an appeal were depending, whereunto the prisoner had not pleaded at the time of his acquittal, cites 4 Rep. 45. b. Holcroft's case.

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*Auterfoits* convicted, or acquitted on an indictment, was a bar at common law to an appeal, because no man's life should be endangered twice for the same offence; and the judges proceeding first on the appeal was merely discretionary, the very preamble of 3 H. 7. saying it was only a usage among them so to do, which statute obliges the judges to proceed within the year and day to hear and determine the indictment, and not to stay on the account of an appeal, without saying (to be brought) or (already brought,) or whether of both. But where the defendant was indicted of murder, and convicted of manslaughter, he shall answer to an appeal the same sessions. If he pleads *Not guilty*, the judges may proceed and try him *de novo*, and hang him on the appeal. If he pleads *auterfoits* convicted, it is no bar; if he will not answer over, his standing *note* must be recorded, and judgment given accordingly, either to be *hanged by nil dicit*, or the *peine fort & dure*. But if the appellant is not ready and cannot go on with his appeal, the appeal will be gone; per Holt Ch. J. 12 Mod. 157. Mich. 9 W. 3. L'Isle v. Armstrong.

If a man be convicted of manslaughter, and no judgment of death given *auterfoits* convicted will not be a good bar of an appeal; but conviction and benefit of clergy is; per Holt Ch. J. 12 Mod. 642. Hill. 13 W. 3. in case of Colt v. Swift.

Br. Additi-  
ons. pl. 58.  
cites S. C.

21. In appeal against several, as J. W. and J. S. late of F. in the county of N. yeoman, and others, the said J. W. said that there is not any J. S. late of F. in the county of N. yeoman in *reum natura* the day of the writ purchased, &c. and to the felony Not guilty. Per Sterkey, the vill and mystery is only addition by the statute, and no parcel of his name, and therefore he shall traverse the name, that it was sufficient by the common law, viz. that no such J. S. and shall not express the vill, county, nor addition. And see M. 35 H. 6. 5. that it is only addition, and none of his name, and therefore, as here, it is pregnancy clearly, as it seems. Br. Appeal. pl. 111. cites 21 E. 4. 71.

S. P. Br.  
Appeal, pl.  
180. cites 2  
R. 3. 9. for  
it shall not  
serve but

for him only to whom it was made; per cur. — S. P. Jenk. 165. in pl. 18. For they have several judgments and executions. — Jenk. 137. at the end of pl. 18. says a release to one appellee [of murder] will not serve the other, as it will in a trespass. Trespass may be satisfied by a recompence paid by one, but no recompence serves for a life lost.

22. And in appeal against several, the one shall not plead a release of all appeals, nor of all executions &c. made to his companions, for in appeal each shall suffer death. Contra of such release in other actions personal. Br. Appeal, pl. 111. cites 21 E. 4. 71.

23. In appeal of robbery it is no plea, that at another time the plaintiff brought trespass of the same goods taken against the defendant, and the plaintiff was barred; for the appeal is of a more high nature than trespass, as a man who is barred in assise may have writ of right. Br. Appeal, pl. 121. cites 2 R. 3. 14.

24. Where the principal pleads a foreign issue to the felony, as *auterfoits* arraigned &c. the accessory shall not be put to answer; and

And if it be found against the principal, this is not peremptory to the accessory. Br. Peremptory, pl. 43. cites 9 H. 7. 19.

25. Note by the justices of both benches, a man shall not have plea in appeal *that the deceased assaulted him, and he killed him in his defence, but shall plead Not guilty, and shall give this matter in evidence*, and the jury is bound to take notice of it, nor shall he have it for plea with a traverse of the murder; for the matter of the plea is no murder, nor can murder be justified; and when the matter of plea is not good, there a traverse is not good. Br. Appeal; pl. 122. cites 37 H. 8.

But in appeal of mai-  
bom it is a  
good plea,  
that it was  
de son assault  
domeſne, and  
in the de-  
fence of the  
defendant;  
Br. Appeal.

pl. 99. cites 12 E. 4. 6. ——— So ibid. pl. 134. cites 41 Aff. 21. ——— And the plaintiff counted in one ward in London, and the defendant justified ut supra in another ward, and did not traverse the first ward, and well; for he cannot be maimed in two places. But e contra, per Knivet, in trespass; for several trespasses may be done in one day. Ibid.

26. In an appeal of robbery, rape, arson, felony, or larceny, a release of actions personal is no plea; for it is of an higher nature, in which † the appellee shall have judgment; but a release of all \* actions criminal, mortal, or concerning pleas of the crown; or 2dly, a release of all actions generally; 3dly, a release of all appeals; and 4thly, a release of all demands, are good bars in all those kind of appeals. Litt. S. 501. and Co. Litt. 288. a.

2 Hawk. Pl.  
C. 196. cap.  
23. §. 133.  
says it seems  
clear that  
whatsoever  
the nature  
of the re-  
lease may  
be, it shall

not wholly discharge the appeal, unless it were made before it was commenced; for if it be subsequent to the appeal, it shall only discharge it as to the suit of the plaintiff; and after judgment given for such discharge, he shall be arraigned at the king's suit.

\* This is a good bar in an appeal of death. Co. Litt. 287. b. at the end.

† [ 576 ]

27. Coverture of the feme, after the murder of her former baron by J. S. is a bar to her having an appeal. D. 296. pl. 20. Mich. 12 & 13 Eliz. Stanley's case. See (A)

28. B. was indicted for the murder of Weatherhead, and being arraigned upon it, he pleaded that A. the wife of Weatherhead brought an appeal against him for this murder, and he was arraigned upon it, and pleaded Not guilty, and tried, and found by the jury that he was Not guilty of murder, but that he was guilty of manslaughter; and thereupon he prayed his clergy and had it, and demands judgment if he shall again be put to answer this felony, and thereupon it was demurred; and now this term it was adjudged a good plea, and thereupon he was openly in court discharged, but no special reason was given of the judgment. Quære; for the finding him guilty of manslaughter in the appeal was more than needed, as it appeared in case of WRATH AND WIGGS, and then the allowance of clergy is to no purpose, &c. Cro. E. 296. pl. 2. Pasch. 35. Eliz. Barley's case.

29. C. was indicted of murder, and found guilty of manslaughter. In appeal brought against him the defendant pleaded the queen's pardon, and prayed allowance of it, and a precedent was shewn Pasch. 8 Eliz. Rot. 33. MUSGRAVE's case, where the defendant pleaded the queen's pardon in this very case, and it was allowed; although in the 9 Eliz. Dy. 261. there was a quære thereof. But Popham said it was a strong precedent; for it is hard the queen should par-

don



don that which is the suit of the party ; and there is no question if it had been an *appeal of homicide*, as it well might, *the queen could not have pardoned it* ; whereto Coke the queen's attorney, of counsel with the defendant, *agreed ; for it is merely the suit of the party ; but here the suit of the party is an appeal of murder, and that wherein he is found guilty is not for the party, but for the queen.* Cro. E. 465. pl. 13. Hill. 38 Eliz. B. R. in case of Penryn v. Corbet.

Cro. E. 778.  
pl. 12.  
Mich. 42 &  
43. Eliz.  
B. R. the  
S. C. and  
the defend-  
ant was  
adjudged to  
be hanged.

30. The defendant in appeal of murder pleaded in abatement of the writ, *that the plaintiff had a writ of appeal pending against him*, and pleaded in hæc verba. But by the opinion of the court he was compelled to plead over to the felony ; for so are all the precedents of the court, and upon this plea it was demurred in law. Cro. E. 694. pl. 5. Mich. 41 Eliz. B. R. Watts v. Brayns.

31. An *attainder at the king's suit at common law* did not bar an *appeal*, if it was brought before the attainder ; but if brought after the attainder it was otherwise. But now by the *stat. H. 7. cap. 1.* neither an attainder nor acquittal at the suit of the king bars an *appeal for murder*, if clergy be not had. Other felonies remain at the common law. At this day an *appeal suspends the proceedings for murder at the suit of the king*, till the appeal is determined. Jenk. 75. pl. 42.

32. The *release of the appellant after judgment*, being shewn to the court, shall stay execution till this release be confessed or proved, or disproved, and the appellant shall be warned upon it by scire facias. Jenk. 137. pl. 82.

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3 Salk. 38.  
S. C. ac-  
cordingly.

33. In an appeal of murder the defendant *pleaded a conviction of manslaughter at the Gaol-delivery at the Old Baily, and that he was allowed his clergy*, but did not shew by what authority the court was held ; and now it was moved to amend it, it being before issue joined or demurrer. But the court doubted, because the appellant cannot amend, and so no reason why the appellee should. In this case if he amends, he makes a new rule ; whereas in other cases the amendments are all in paper, and no statute extends to amendments \* in appeal, and it is not warranted by the course of the court. 4 Mod. 158. Mich. 4 W. & M. in B. R. Hoile v. Pitt.

\* But see  
(S) pl. 6.  
Smith v.  
Bowen.

Comb. 410.  
S. C. Holt  
Ch. J. said  
he did not  
understand  
the reason  
why clergy  
should be  
delayed to  
charge a

34. *Conviction of manslaughter with clergy had* is a good bar to an appeal antecedent, concurrent, or subsequent, and so it is if *clergy was not had by the default of the court* ; for it has been adjudged, that the praying of clergy is having of clergy within the statute ; for by praying it the prisoner has done all he could, and the delay of the court ought not to prejudice him. 1 Salk. 63. Hill. 8 W. 3. B. R. in case of Armstrong v. Lisle.

man with an appeal ; and said it was argued in the case of GORING v. DERRING, but that it is fit to be argued again. And at another day he said, that the court ought to allow the prisoner his clergy, and the statute 3 H. 7. 1. requires a determination.——Skin. 670. S. C. says, that Holt Ch. J. inclined strongly that the court ought not to refuse to allow clergy to one convicted of manslaughter, but in regard of some resolutions contra it was fit to be argued ; that he had argued it both ways, but never was satisfied in his judgment with the resolutions given that they may respite clergy ; for by this means they put it in the power of the judges to hang a man.——12 Mod. 157. S. C. and per Holt. Ch. J. neither an acquittal nor an attainder upon an indictment shall be a bar to an appeal, as it was at common law, but only the *having clergy*, which has been extended so far that if a man *prays his clergy*, and the court does not give it him, he having done what lies in his power, the delay of the court shall not prejudice him ; now in this case there is no prayer made



made to have his clergy; but how comes that to pass? Why? the party was never asked; and if the court will not proceed to judgment, and call him down to judgment, he has no opportunity to ask his clergy, and therefore he thought it a good plea in bar, of which opinion were the other 3 justices, and so the appellee was discharged.

35. The defendant in appeal of murder pleaded in abatement, *that the vill in which he was commorant was Shauford, absque hoc that it was Shalford*; it was objected that this plea was not to be received without an affidavit since the act for amendment of the law, it being a dilatory plea, and the court at first inclined accordingly, criminal cases not being excepted out of the act, (the exception of appeals in the act relating only to the preceding clause;) but afterwards the court thought it might be read without an affidavit, because though this plea be for the most part dilatory, yet in this case it is not, because the appellee must plead over, and issue be joined on that as well as upon Not guilty, and both may be tried at the same time. 11 Mod. 217. pl. 5. Pasch. 8 Ann. Br. Young v. Slaughterford.

### (X) Pleadings. Plea in Bar waved in what Cases.

1. **A**PPEAL of death of the husband by the feme, the defendant said, *that the baron is alive &c.* and the other contra, by which day was given to bring in the proofs, who came, and there was default in both their proofs, by which the defendant for the danger pleaded not guilty; and hence it seems that the first issue found shall be peremptory, and that he may wave it before trial in favour of life. Br. Appeal, pl. 137. cites 43 Ass. 26.

2. In appeal of murder the defendant pleaded not guilty, and *issue was joined thereupon.* Afterwards the defendant waved it, and demurred upon the declaration. And the court held clearly that so he might; for if the declaration be not good, it is in vain to proceed to trial; yet it was clearly held, that it is *not peremptory to the defendant*, for if it be adjudged against him it is only a *respondeas ouster*. Cro. E. 196. pl. 13. Mich. 32 & 33 Eliz. B. R. Hume v. Ogle.

[ 578 ]

### (Y) Pleadings. Replication.

1. **I**F in appeal the defendant pleads not guilty, *prist by his body,* and tenders battle, the plaintiff says that he was taken with the mainour, judgment if against such matter he shall be received to wage battle, the mainour is not traversable, per Hussey and Fairfax J. & non negatur. Br. Traverse, per &c. pl. 273. cites 22 E. 4. 19,

put every defendant from his law in appeal of robbery, [as this case was, as appears in the year book.]

Ibid. Brooke says, that so it seems that the plaintiff by such allegation may

2. Appeal against J. and A. viz. against J. as principal, and against A. as accessory, and J. came and said, that at another time &c. he was arraigned of the same felony and attainted, and shewed the record in certain, judgment if he shall be at another time put to answer, and the plaintiff said, that this appeal is of another thing than is comprised within this record, and so to issue, and A. was not put to answer; for the accessory shall not be put to answer till the principal be put to answer, and the principal shall not be compelled to answer twice to one and the same felony; for life shall not be twice in jeopardy for one and the same felony, and if the principal be found guilty here, this is not peremptory to the accessory, but it shall be inquired whether he be guilty or not. Br. Appeal, pl. 89. cites 9 H. 7. 19.

## (Z) Discontinuance or Nonsuit &c. The Effect thereof.

Appeal of  
Maihem,  
nonsuit after  
appearance  
is peremp-  
tory, contra

1. **I**N appeal of *mayhem* the plaintiff was nonsuited, and took another appeal, in which he altered in the principals and accessories, and it was awarded that he shall take nothing by his writ, but *capiatur*. Br. Peremptory, pl. 85. cites 40 Aff. 1.

it seems of nonsuit before appearance. Br. Appeal, pl. 138. cites 43 Aff. 39.——If plaintiff in appeal of maihem is nonsuit after appearance it is peremptory, for the writ says *Felonia maihemavit*, and therefore the nonsuit is peremptory. Co. Litt. 139. 2.——But after nonsuit in trespass of battery Appeal of *maihem* lies of it, but he shall not have trespass after nonsuit in appeal of *maihem* of the same battery; note a diversity. Br. Appeal, pl. 138. cites 43 Aff. 39.

Nonsuit in  
appeal after  
appearance  
is peremp-  
tory, and  
shall not

2. Two are indicted of the death of the husband, the feme brought appeal against the one, who is acquitted by nonsuit after appearance or *otherwise*, she shall not have appeal against the other, nor no other. Br. Appeal, pl. 139. cites 47 Aff. 7.

have other appeal; Per Hull. Br. Appeal, pl. 28. cites 9 H. 4. 1. 2.——Br. Peremptory, pl. 80. cites 18 E. 3. and Fitzh. Avowry 47.——2 Hawk. Pl. C. 193, 194. cap. 23. S. 129. says it seems to be certain, that a nonsuit on a bill of appeal, whether commenced in the court of B. R. or before justices of goal delivery, or before the sheriff and coroners, or a nonsuit after declaration on a writ of appeal, is a bar of all other appeals of the same kind; because no such bill or declaration shall be received till the appellant have first appeared in proper person; and it seems agreed by all the books, that a nonsuit after such an appearance is peremptory. Also it is holden generally in some books, that a nonsuit after appearance is a peremptory bar to the appellant, without adding that he must also have declared; from whence, and also from the general reason of the thing, it may be reasonably argued, that if it any way appear on record that the appellant who was nonsuited in a former appeal did actually appear and prosecute such appeal, as by praying of process on it &c. he shall be barred in any other appeal of the same kind. But it seems, that the bare taking out of a writ of appeal, and causing it to be delivered of record to the sheriff, and a nonsuit upon it, is no bar of a 2d appeal, because it does not appear of record, but that it might be done by a stranger; and notwithstanding some books seem to hold generally, that any nonsuit in appeal is peremptory, yet it seems to be in a great measure settled at this day, that such nonsuit ought to be after appearance in proper person of record.

\* [ 579 ]

S. C. cited  
Kelyng's  
Rep. 92. in  
case of  
Armstrong  
v. Lisle,  
and says it

3. A man was found guilty upon an indictment for the murder of J. S. and immediately his wife brought an appeal, to which the defendant *pleaded*, that after the death of her first husband she had married another at E. but did not shew his name, which was a *foreign plea*. The plaintiff replied, and so the matter depended a year,

year, and more. The prisoner and all the proceedings were removed into B. R. by certiorari, and the court demanding of him what he could say why judgment should not be given against him upon his former conviction, he pleaded all the matter above, and that the appeal was still depending; but it being brought in another county than where the indictment was laid, and there being no continuances of the appeal entered after the said foreign plea pleaded, which was more than a year past, and so the record certified, the question was, what should be done? And afterwards the same was nonsuited, and so the court gave judgment upon the indictment that the defendant be hanged. D. 296. pl. 20. Mich. 12 & 13 Eliz. Stanley's case.

is so very strange that it cannot amount to the least authority, and adds a note, that it is left with a quare and so in judicial determination saving that the man was

hanged; that the court gave no opinion concerning the sufficiency of the plea, nor does it appear how the plaintiff became nonsuit, for there was not any opportunity for it, therefore it was irregular; for the plea was discontinued by the certiorari; for all removals of causes upon certioraries determine the plea, therefore that case is no authority, but only an history of what was done, for the man was well condemned and executed upon the conviction, and those scruples then made were very unnecessary.

4. In appeal of murder the defendant pleaded that another time he was acquitted of the murder, but found guilty of manslaughter; and now the great question was, whether the plaintiff in appeal might be nonsuited? And adjudged that he might not, and this by reason of the precedents alleged by the clerk of the crown. Mo. 407. pl. 546. Trin. 37 Eliz. Perin v. Corbet,

Cro. E. 464. pl. 17. Hill. 38. Eliz. B. R. Penryn. v. Corbet, S. C. the reason why

the plaintiff would have been nonsuited was, because the defendant had compounded with him, and the court doubted if it might be allowed, it being after a general verdict, although it were in another term, and that it was then prayed that a retraxit might be entered thereof, and thereof the court likewise doubted whether it might be, but they would advise.

5. An infant brought an appeal of murder by his guardian; at the day in court it was prayed that the guardian be not demanded because he is sick, and that the court would give 1 or 2 days further for his appearance; but per cur. this cannot be in appeal; for the court cannot make laws, and thereupon the plaintiff being demanded and not appearing, \* [the defendant was discharged.] Lat. 173. Hill. 2 Car. Anon.

S. C. cited per Cur. 12. Mod. 374. Pasch. 12. W. 3. in case of Stout v. Towler—S. C. cited by Holt Rep. 556.

Ch. J. but misprinted (as 178) in S. C. Ld. Raym.

\* [580] R. 3. 9. in pl. 18. cites S. P. as held 11 R. 2. — in an

6. Where an appeal is brought against 2, and one of them has a charter of pardon, and he sues a sci. fa. against the appellant who is summoned and makes default, which is recorded, this shall discharge him that has the pardon, but not the other. Jenk. 165. pl. 18.

appeal of murder the defendant is outlawed and has a charter of pardon, the appellee shall have a scire facias against the appellant without shewing any release, for the appellant shall not have execution if he does not pray it in person; by attorney will not serve; upon this scire facias the appellant being summoned makes default, which default is recorded, the appellee shall have his pardon allowed, and shall be discharged, and the appellant cannot pray execution at another time; by the judges of both benches. Jenk. 165. pl. 18. cites 2 R. 3. 38.

7. The wife brought an appeal of murder of her husband against the Earl of S. and others, and it was agreed in this case, that a nonsuit of the appellant after appearance in proper person, is peremptory, but not so before appearance in proper person; but

Kelynge serjeant insisted, that there was no difference, because the appearance of the appellant is never entered on record, for he ought always to be ready in propria persona, and is demandable every day, and shall be nonsuited upon non-appearance, and therefore prayed that the lady Grey might be demanded, but the court, by reason of the peremptoriness thereof, would advise. Sid. 32. pl. 11. Hill. 13 & 14 Car. 2. B. R. Lady Grey v. Ld. Southeske & al.

2 Hawk.  
Pl. C. 194.  
cap. 23. S.  
130 says he  
cannot find  
it any  
where ad-  
judged that  
the discon-  
tinuance of  
one appeal

8. An appeal *before appearance was discontinued* and the next term, the defendant being in court prayed to be discharged, the appeal being discontinued; but the court gave a day to bring in the roll, when it was prayed that they might proceed against him in *custod. mareschalli by bill*, which was allowed, and the appeal was arraigned; and the court ordered a roll to be made, and a copy of it to be delivered, and gave the defendant day to plead. Skin. 634. pl. 3. Hill. 7 W. 3. B. R. Reynolds v. Keyning.

was a bar of another; but supposing the law to be so, yet surely it is to be of such a discontinuance only as happens after the appearance of the appellant.

12. Mod.  
20. Lowder  
v. Scrow-  
deus, S C.

9. If the plaintiff be not present, he may be demanded and *nonsuited*; but such nonsuit is *not peremptory*, because before appearance. 1 Salk. 64. Pasch. 4 Ann. B. R. Loder's case.

10. An appeal was brought *by the wife* for the murder of her husband, and upon a demurrer, exception was that there was a *discontinuance*; for, in the exigent the words *de morte viri sui unde eum appellat*, were omitted, and therefore it did not appear that this exigent was sued out in this action. It was answered, that this was an exigent sued out between the same parties that the *capias* was, and that there is no variance between the *capias* and the exigent, though there is something more contained in the *capias* than what is in the exigent; and upon prayer of oyer of *mesne process* in this action, this exigent was recited, and thereby admitted to be the exigent in this suit. It was argued that this *discontinuance*, if it was one, was *aided by appearance*; and that the difference taken, that appearance and pleading-over does aid a discontinuance, but not appearance and demurrer, was not law. Adjournatur. 10 Mod. 86. Pasch. 11 Ann. B. R. Widdrington v. Charlton.

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11. If appeal be brought against diverse, a *retraxit as to one* is no bar for the others. Hale's Pl. C. 190.

If the appellant be barred by a *retraxit as to one*, yet he may continue his suit against the rest, because he is to have a several execution against every one of them; yet in an appeal against divers, whether they plead the same or several issues, it has been adjudged that a nonsuit against one, at the trial of any one of the issues, is a nonsuit to all; of which this seems to be the best reason, that such a nonsuit operates in nature, as a release of the whole; but whether the discontinuance of an appeal, as to one appellee, shall have the like construction as to all, may deserve to be considered. 2 Hawk. Pl. C. 196. cap. 23. S. 134.

(A. a) In what Cases an Attorney may be made.

1. **A** P P E A L by a feme, grossly enfeint, of the death of her husband, and the defendant was attainted at the suit of the feme, and the appearance of the feme recorded for all the term; and yet by the best opinion she cannot pray the judgment and execution by her counsel, but in proper person, by which one of the judges rid to her to Islington, to see whether she was alive, and if she would pray execution, and she prayed it, by which judgment was given that he should be hanged; for this action shall be sued in proper person, and likewise judgment shall be demanded in proper person; and after the judgment the execution cannot be prayed by attorney, but in person; and appeal of maihem shall be in person, and so see that all appeals shall be in person, and not by attorney. Br. Appeal, pl. 112. cites 21 E. 4. 72. 73.

Br. attorney, pl. 78. cites S. C. —Jenk. 137. pl. 81. S. C. & S. P. accordingly.

2. 3 H. 7. cap. 1. parag. 19. Enacts, that the appellant in any appeal of murder, or death of a man, where battail, by the course of the common law lies not, may make their attornies, and appear in the same in the said appeals, after they are commenced, to the end of the suit and execution of the same.

3. In an appeal of maihem the plaintiff appeared by attorney, and declared against the defendant. The defendant prayed that the plaintiff might be demanded; for that he could not appear by attorney, and if the plaintiff appeared not, that he might be nonsuited; against which the counsel of the plaintiff objected, that the plaintiff in an appeal of maihem might appear by attorney; for that it might be that he was so wounded as he could not appear, and for authority cited the book in 21 H. 7. But it was answered, and resolved per tot. Cur. That the plaintiff could not appear by attorney; for the defendant may demand oyer of the maihem &c. which shall be peremptory to him, being a trial of the maihem, which is a trial which the law gives him; and albeit it may be hard and difficult in some particular case, in respect of the grievousness of the maihem, for the plaintiff to appear in person; as it was in 16 H. 5. where the maihem was heinous, the legs of the plaintiff being broke over a threshold, yet that must not change the law, nor take from the defendant his just defence and trial; for so, upon the like surmise, the defendant might be barred thereof in all cases. And Wray Ch. J. said that the record of CAWORTHS CASE had been seen, and that it was against the report, and thereupon the plaintiff was called, and by the rule of the court was nonsuit; and Ld. Coke says he was of counsel in this case, which he has the rather reported more at large, for that no man should be deceived by the said report, 21 H. 7. 2 Inst. 313. cites Mich. 25 & 26 Eliz. B. R. Hudson v. Marwood.

4. In appeal of murder brought by the widow against the defendant, and another who did not appear, upon the return of the writ the appellee appeared, and it was moved to admit the appellant

Skin. 48. pl. 1. S. C. accordingly. —It



being proved that appellant in murder might be called in, and so she was;

but her attorney appearing for her, it was held sufficient, the appeal being brought by a woman. 12 Mod. 65. Mich. 6 W. & M. Sutton v. Sparrow.

1 Salk. 62. S. C. and per cur. every appeal must be commenced in person, but may be prosecuted by attorney, unless where a wager of battail lies; and in such case be must commence in person, and prosecute in person also.

But where there is no wager of battail it may be prosecuted by attorney, for which there must be a special warrant of attorney filed; and if the plaintiff appears by attorney, where he ought not &c. this is a discontinuance.——Comb. 411. S. C. The court doubted whether he might be admitted to appear &c. by attorney, because it must appear to them that the indictment was for the same offence, where battail lies not by the stat. H. 7.

pellant to prosecute by attorney, and a warrant of attorney under her hand and seal was produced, and acknowledged by her in person, (for otherwise it must have been proved by witnesses) and she was admitted accordingly, and the warrant filed. 2 Jo. 210. Trin. 34 Car. 2. B. R. Warren v. Verdon.

5. L. being indicted of murder was convicted of manslaughter, and prayed his clergy by a friend not being in court himself; and after at the same assises an appeal was lodged by the brother and heir of the party slain, and the conviction and appeal were removed by certiorari, and the party by habeas corpus; and at the return of the certiorari it was moved by the appellant that he might file a letter of attorney, in which case the court would not make any rule, but said that they might file it at their peril; yet insinuated that they could not file a letter of attorney by the stat. of Hen. 7. till after appearance; and they admitted clearly that in maihem they could not make an attorney; and the court said that if he filed a letter of attorney, and the law required an appearance in person, the appeal would be discontinued. Skin. 670. pl. 9. Mich. 8 W. 3. B. R. Armstrong v. Lisle.

6. The appellee after his acquittal may sue for the damages by attorney. 2 Hawk. Pl. C. 203. cap. 23. S. 149.

(B. a) Pledges or Bail. In what Cases they may or must be found.

1. **T**HE defendant was not let to bail in appeal of maihem, no more than in appeal of murder or robbery, because the maihem was heinous; for the thighs were broke upon a threshold. Br. Appeal, pl. 86. cites 6 H. 7. 1.

2 Show. 159. pl. 144. Wal-kin v. Os-borne, S. C. It was urged that pledges might be put in any time before judgment; and held that in appeals pledges ought to be found before any answer by the appellee.

2. In an appeal of felony against the defendant then in gaol in the county where the appeal was brought, the plaintiff declared, and the appellee imparled, and afterwards was bailed. Afterwards the record was removed by certiorari into B. R. where the parties appeared in person, and upon oyer of the record of appeal the defendant imparled to another day, and then demurred to the bill of appeal, because the plaintiff non invenit plegios ad prosequendum appellum, and pleaded over to the felony not guilty. The appellant joined in demurrer, and resolved that pledges might be found at any time before judgment, and thereupon the plaintiff found pledges, and issue was taken upon not guilty. 2 Jo. 154. Pasch. 33. Car. 2. B. R. Blenkarne v. Osborn.



3. Appellee of murder prayed to be admitted to bail, which the court said they could do *on issue joined, demurrer, or curia advisare vult*, if he could find 4 sufficient bail who would be bound body for body; but those he offered not being approved of, he was remanded to the Marshalsea. 11 Mod. 216. 217. Pasch. 8 Ann. Smith v. Bowen.

(C. a) Verdict. What the Jury must or may find.

1. **A** PPEAL of murder of the death of his brother. The defendant pleaded not guilty, and found not guilty; and per cur. because the defendant was indicted before the coroner, therefore they ought to find who killed the man. Br. Appeal. pl. 42. cites 14 H. 7. 2. *Contra* if he had been indicted before the sheriff or justices of the peace. Br. appeal, pl. 42. cites 14 H. 7. 2.

2. Where the jury acquit the defendant upon indictment before the coroner, they ought to find who killed the man, and there they may say that the same defendant killed him *se defendendo*. Br. Appeal, pl. 122. cites 37 H. 8. *But upon indictment before other justices, it suffices to say not guilty only, without more. Ibid.*

3. Appeal of murder; the defendant pleaded not guilty, and being arraigned by a substantial jury of Middlesex, the evidence was pregnant that he was guilty of manslaughter, but for the murder was doubtful; the jury found he was not guilty of murder, and being demanded if he was guilty of manslaughter, they answered they had nothing to do to enquire of it; and upon this the court being in doubt sent Fenner J. to C. B. to know their opinion, who conceived, that by the law the jury are not compellable to enquire of the manslaughter and thereupon they gave their verdict as before, and the prisoner was discharged. Cro. E. 276. pl. 5. Pasch. 34 Eliz. Wroth v. Wigs. *4 Rep. 45. b. S. C. but I do not observe S. P. —Hale's Hist. P. C. 449. 450. cap. 36. cites S. C. & S. P. ruled accordingly [but the Editor in a remark says*

“Or rather taken for granted,”] and says that though upon an indictment of murder, if the party appears to be guilty of manslaughter the jury ought not to acquit him generally, but find him guilty of manslaughter; yet in an appeal of murder, though they may, if they please, find him guilty of manslaughter, if the fact be such, yet they may find generally that he is not guilty; because it is the suit of the party, and he should lay his case according to the truth. And with this agrees Hill. 38 Eliz. B. R. Penryn and Corbet's case, and Blount's Case; but says it was held Pasch. 2 Car. 1. in *BASSAGE'S CASE*, that they may not in such case find a general verdict of not guilty, but must find him guilty of manslaughter, because included in murder as well in case of an appeal as in case of an indictment. And so it seems the law is.

(D. a) Judgment of Damages, in what Cases by the Statute of Westminster 2. cap. 12.

1. *Westm. 2. 13 E. 1. cap. 12.* **F**ORASMUCH as many through malice intending to grieve others, do procure false appeals to be made of homicides and other felonies, appellors having nothing to satisfy the

*the King for their false appeal, nor to the parties appealed for their damages.*

By the words hereof it appeareth, that before this statute the defendant being duly acquitted, should recover his damages, but that is to be understood in a writ of conspiracy, wherein he should recover damages for satisfaction in regard

\* 2. *Damages in appeal of felony are always on the part of the defendant, to be recovered by him upon his acquittal, and such recovery is given to him by the common law, as appears Mich. 48 E. 3. 20. and by the recital of this statute of W. 2. cap 12. for common law and common reason wills, that when one has sustained a trial whereby his lands, goods, life, and good fame, have been in jeopardy undeservedly, or without other foundation than the malicious accusation of another, and he is found verus & fidelis homo, and duly acquitted of that whereof he is appealed, he should have amends against his false accuser; and if his accuser be not sufficient, then against such as procured or abetted the prosecution; but because the damages to be recovered against the procurers or abettors were to be recovered by original writ, viz. of conspiracy and not otherwise, which was not so speedy redress as the great malice or badness of the offence required, this statute was made to make it more speedy. St. P. C. 167. b. cap. 11.*

of the infamy, imprisonment, and vexation done to him, and further that the parties convicted should be fined to the king, and imprisoned, which *Ld. Coke* says he had read to have began in this sort before the reign of *H. 1.* They which plotted or compassed the death of a man under pretext of law by bringing of false appeals, or preferring untrue indictments against the innocent of felony, who being duly acquitted, both the appellant and his abettors were to suffer death. But *king H. 1.* by authority of parliament did mitigate the severity of this ancient law (lest men should be deterred and afraid to accuse) and did ordain that if the delinquents were convicted at the suit of the party, they should make satisfaction, and be fined and imprisoned; but if they were convicted by judgment at the suit of the king, (whom they pretended to intitle to the forfeiture) then should lose the freedom of the law; they should be so infamous as never to be any witness, or to be of any jury; that they should never come in or near the king's court, but make their attornies, that they, their wives and their children should be cast out of their houses, and their houses prostrated, their trees eradicated and subverted, their meadows ploughed up and wasted, every thing to be destroyed which nourished or comforted them in respect of the villainy and shame done to the delinquent, all against nature and order, for that the delinquent sought the blood of the innocent under pretext and colour of law; and this in latter books is called, a villainous judgment; all which in case of conspiracy, remain a constant law to this day. But this act doth give the party a speedier remedy for his satisfaction than he had before, as hereafter shall appear. 2 Inst. 384.

\* Br. damages, pl. 106. cites S. C. & S. P. according-ly.—S. P. according-ly, nor shall he have conspiracy, and in such

3. By the words (*through malice*) if the defendant be to recover damages, it must be for that the appeal is founded more on malice than good matter, and therefore if the defendant was indicted of the felony, whereof the appeal is sued before the suit of the appeal, though the defendant be after acquitted thereof, yet he shall never recover damages; for it shall be intended that the indictment and not malice induced him to bring the appeal. St. P. C. 168. b. (B) cites *Fitzh. Corone 178. \* 22 Aff. [39]* and *Mich, 40 E. 3. 28.*

case the jury shall not inquire of the abettors. Br. Appeal 4. cites 33 H. 6. 1. 2. says it was granted there per cur. arg.—S. P. Br. appeal, pl. 147. cites 34 H. 6. by *Billing* and tot. cur. and says the reason is because he is indicted.—S. P. but where he is indicted as principal, and appealed as accessory, or e contra, there the defendant shall have damages. Contra where the indictment and appeal agree; for indictment is sufficient cause to bring the appeal; quod nota. Br. appeal pl. 6. cites 40 E. 3. 42.—S. P. ibid. pl. 73. cites 40 Aff. 18. where the indictment is before the appeal, but contra if after the appeal.—S. P. ibid. pl. 58. cites 22 Aff. 39.—2 Inst. 380. S. P. that it shall not be understood to be commenced per malitiam, because the plaintiff had a foundation to build upon, viz. an indictment by the oath of 12 or more men, so as it shall be presumed that the plaintiff was moved to his appeal by the indictment, & non per malitiam; for in those days (as yet it ought to be) indictments taken in the absence of the party were formed upon plain and direct proof, and not upon probabilities or inferences. But if the indictment

*indictment be insufficient*, then it is in judgment of law as no indictment, and then the appeal may notwithstanding be commenced per malitiam, & sic in similibus, or if it be a good indictment, and found after the appeal commenced, yet may the appeal be commenced per malitiam.

Soon after the making of this statute, the wife and her 2d husband brought an appeal for the death of her former husband, whereas it would not lie by reason of her marriage, so that the bringing the appeal was rather folly than falsity, and therefore ex gratia curiæ she was ordered to prison for 15 days, and then to make a fine to the king. 2 Inst. 584. cites Mich. 34 E. 1.

4. Contra if he be *not indicted till after the appeal commenced*, or if there be such *variance between the appeal and indictment* that the acquittal of him on the one is not an acquittal of him upon the other, as if he be indicted as principal and appealed as accessory, or e contra. But if the variance be *not in a matter of substance* it is otherwise. St. P. C. 168. b. (B) cites Mich. 14 H. 7. 2. For such variance shall not prejudice so far, but that the acquittal upon the one shall be an acquittal also upon the other.

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In appeal the defendant is acquitted, and prayed that it be inquired of the abettors, and he was

*indicted of the same felony before the appeal*, but there was a variance between the indictment and the appeal, and yet because he was indicted, and therefore it appeared that the appeal was not sued for malice, it was not inquired; for the plaintiff cannot recover damages, Br. Appeal, pl. 43. cites 14 H. 7. 2. ——— Br. Damages, pl. 80. cites S. C.

5. Appeal of robbery the *defendant was acquitted and said that the plaintiff is not sufficient to render damages*, and prayed that it be *inquired of the abettors*. Row said this ought not to be, and shewed a paper by which the defendant was indicted of the same felony. But because it was only paper, and did not contain what day and year, the indictment was taken, nor before whom, &c. therefore the jury was charged to inquire what damages the defendant had, and then whether the plaintiff be sufficient to render them, and if not then to inquire who were the abettors; quod nota. Br. Appeal, pl. 1. cites 26 H. 8. 3. 4.

If the appeal be founded upon a good indictment and the defendant is acquitted it shall not be inquired of the abettors; for the indictment is sufficient cause

to sue the appeal. And e contra upon insufficient indictment. Br. Appeal. pl. 108. cites 20 E. 4. 6.

6. If the *heir abets his mother* to bring the appeal he is out of the danger of this statute though within the words of it. Per Mountague Ch. J. Pl. C. 88. b. Hill. 6 & 7 E. 6.

The heir or other near of kin may abet the wife

plaintiff in the appeal, Et sic adjudicatur quod pater, mater, frater, &c. non sunt in casu hujus statuti ratione propinquitatis sanguinis, & ad eos pertinet prædictam mortem ulcisci, ROYLAND'S case, and cannot be said to be per malitiam. 2 Inst. 384. ——— 2 Hawk. Pl. C. 199. cap. 23. s. 138, says that some seem to have gone so far as to hold, that the heir who abets his mother in bringing an appeal for the death of his father can be in no case within the statute by reason of such abetment; because nature and duty oblige him in such a case to abet his mother. But this reasoning, strictly examined, seems to prove no more than this, that in such a case the heir shall prima facie be intended to have abetted the appellant rather out of duty than malice, and that therefore he shall not be taken to be within the purview of the statute, without very strong evidence of his malice. But surely it cannot be denied that in some cases it may be notorious, that an heir abets such an appeal, not out of duty but malice; as where he himself, without the least probable ground of suspicion, is the first promoter of the prosecution; or where he causes it to be carried on by violent or unfair methods, not for the sake of justice but oppression, in which case it seems harsh to say, that he is not as well within the meaning as letter of the statute.

7. Note that though by the letter this word (*Malice*) is referred only to the abettors and procurers, yet the books before cited understand it to extend as well to the appellant as to them. St. P. C. 168. b. (C).

2 Inst. 384. says that malitia refers only to

the procurors and abettors, by the express words of this act. ——— In the several places of this statute the malice is expressly referred to the procurors and abettors only, and in no part to the appellant. Some hold, that wherever an appellee is acquitted of an appeal of felony, he shall recover damages by this statute against the appellant, except only where he hath been indicted of the

*the same felony before.* And it must be confessed that in the reports and entries relating to this matter, damages seem generally of course to have been awarded against the appellant on the acquittal of the appellee in all other cases, without any finding that the appeal was malicious. Yet others hold, that the appellant is no more within the intent of the statute than his abettors, unless his appeal were grounded on malice. And if it be considered that where the appellant is to render damages by this statute, he is also by the express words of it to have *a year's imprisonment, and to be grievously ransomed to the king*, surely it cannot be imagined that the makers of the statute intended in any case to expose him to so severe a punishment for a legal prosecution, which he has reasonable evidence to induce him to commence, though it may not be sufficient to induce a jury to convict the defendant. Neither do I see any reason why the bringing an appeal against one, who before

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hath been indicted, by a sufficient indictment of the very same crime, which is agreed not to be within the meaning of the statute, should be the only excepted case; especially considering that any other case, wherein the appellant plainly appears to proceed on a *probable ground of suspicion*, is within the reason given in many books for the favour shewn to the appellant, where the appellee has been indicted before, which is this, that the appellant had *cause and evidence to pursue* the appeal and it appears to the court that it was *not merely founded on malice*. And this is also one of the reasons given in the books why the appellant is not to render damages by the intent of the statute, where the appellee in appeal of murder is found guilty of homicide, *se defendendo* only. And as to the general expressions of the books abovementioned, in which damages seem of course to be awarded against the appellant, without any inquiry whether his appeal were malicious or not, it may be answered, that the books speak as generally in relation to the recovery of the damages against the abettors; and yet it seems plain from the whole purport of the statute, that they are not within the purview of it, unless their abetment were founded on malice. 2 Hawk. Pl. C. 198. cap. 23. f. 138.

*It is ordained that when any being appealed of felony surmised upon him doth acquit himself in the king's court in due manner, either at the suit of the appellor, or of our lord the king, the justices before whom the appeal shall be heard and determined, shall punish the appellor by a year's imprisonment.*

*And the appellors shall nevertheless restore to the parties appealed their damage, according to the discretion of the justices, having respect to the imprisonment or arrestment that the party appealed hath sustained by reason of such appeals, and to the infamy that they have incurred by the imprisonment or otherwise, and shall nevertheless make a grievous fine unto the king.*

2 Inst. 384. S. P. accordingly as to the words (*Homicides and other felonies.*)

9. This word (*felony*) is not only intended of such offences as were felonies at the time of making this statute, but also of all other offences made felonies since. St. P. C. 168. b. (D) cites Fitzh. Corone 381. Hill. 12. E. 2. and 275. Hill. 22 E. 3. Before this statute rape was not felony, but is made felony by stat. Westm. 2. cap. 34. and yet if the defendant in appeal of rape be acquitted, the abettors shall be inquired if the plaintiff is not sufficient to render damages, which seems strange, because the statute which says ("procure false appeals to be made of homicides and other felonies, &c.") seems to be intended of felonies then before, and not of felonies made by the same statute [Westm. 2. cap. 34.] per Staundford J. Pl. C. 124. b. Trin. 2 Mar. but says it is taken as he has said, but says, that he had not seen the like construction of the words in any other case and especially where it is penal.— 2 Hawk. Pl. C. 199. cap. 23. f. 139. S. P. and says it has been adjudged.

This statute extends both to acquittals in deed, and to acquittals in law. Acquittals in deeds, as either by verdict or by battail, and

10 The words (*acquit himself in due manner*) may be understood as well where the defendant acquits himself by *battail* as by the country. St. P. C. 168. b. (E) cites Fitzh. Corone, 98. Pasch. 41 E. 3. but this acquittal by battail is intended thus, viz. where the appellant being *in the field confesses his appeal false*; for this is a kind of vanquishing, and is not to be intended of his being *killed in the field*; for there by his death the damages are gone and lost for ever without recovery.

11. There is an *acquittal in law* as well as an *acquittal in fact* for

for if two are appealed, the one as principal, and the other as accessory, and the principal is acquitted, the accessory shall recover his damages against the appellant if the inquest that tried the principal were likewise charged upon the accessory, notwithstanding they give no verdict as to the accessory; for he shall have writ of conspiracy by the common law; for he put his life in jeopardy by a mesne. St. P. C. 168. b. (F) 169. a. cites Hill. 33 H. 6. 2.

in that case when the plaintiff yields himself, or vanquished in the field, the judgment shall be that the appellee shall go quit, and that he shall recover his damages against the appellant, but if the plain-

12. But where the principal is acquitted the accessory not having appeared, but process is pending against him, it will be otherwise. St. P. C. 169. a. cites Fitzh. Corone 222. 48 Aff. [but that plea cites 41 Aff. 24.] For in this case he must be expressly acquitted by verdict, or otherwise he shall neither recover damages by this statute, nor shall have writ of conspiracy by the common law.

tiff had been slain, then no judgment can be given against a dead person. Acquittals in law, as if 2 be appealed of felony, the one as principal, and the other as accessory, and both of them plead Not guilty, &c. and the jury does acquit the principal, in this case by law the accessory is acquitted, and shall recover damages by this act against the appellant, &c. or may have his writ of conspiracy at the common law. But if the principal be acquitted by verdict, process depending against the accessory, the accessory shall not recover damages within this statute because no jury can be returned to assess them. 2 Inst. 385.

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If one be appealed as accessory to two principals, and one of the principals is acquitted, the accessory shall recover no damages until the other principal be acquitted. 2 Inst. 385. D. 120. pl. 10. Mich. 2 & 3. P. & M. and 131. pl. 72. Pasch. 2 & 3 P. & M. Read v. Rochford & al. S. C. 2 Hawk. Pl. C. 200. cap. 23. f. 140. S. P. and says it seems clear, because it does not appear by any thing but that he might be accessory to the other. 2 Hawk. Pl. C. 199, 200. cap. 23. f. 140. says, if 2 were appealed, the one as principal and the other as accessory, and the jury being charged on the accessory as well as the principal, do acquit the principal; it seems to be agreed, that the accessory shall recover damages by the intent of the statute, without any express verdict concerning him, because he is impliedly acquitted by the acquittal of the principal; for it is impossible that there should be an accessory where there is no principal. And this reason seems to hold as strongly for the damages, where the accessory does not appear on the trial or acquittal of the principal, because in such case the acquittal of the principal is as much an acquittal of the accessory as where he does appear; but it is holden by Sir Edw. Coke, that such an accessory shall not recover damages, because no jury can be returned to assess them; and Sir William Staundford seems to be of opinion, that such an accessory shall not recover, unless he be expressly acquitted by verdict after the acquittal of the principal; yet whether the justices themselves may not in a case of this nature, if they think proper, assess the damages without any jury, or else assess them by an inquest of office, may deserve to be considered; also it seems to be to little purpose to require an actual acquittal of a person, where it appears by the acquittal of another that he could not be guilty.

13. If the defendant bars the plaintiff of his appeal, he shall not recover damages unless it be such bar as acquits him of the felony, for the whole stress of the statute is upon those words (acquit himself in due manner;) and therefore if he pleads that the appellant is a bastard, or has an elder brother, or Ne unques accouple, &c. or the like, and thereby bars the plaintiff, yet he shall not recover damages, for he may be afterwards indicted of the same felony and attainted, notwithstanding by those pleas he is discharged as well against the king as against the party. St. P. C. 169. a. (A) For such pleas as do not try the defendant's innocence as to the felony, intitle him no more to damages than if he had pleaded in abatement such plea as had abated the appeal, for though such plea discharges the appeal both against the king and the party, yet it does not discharge him of the felony.

In appeal of death by one as cousin, but did not shew how cousin, and therefore the writ abated, but damages were not given to the defendant, because it may be that he shall be thereof indicted and convicted at the suit of the king.

14. So where the plaintiff is barred by a demurrer in law. St. P. C. 169. a. cites Fitzh. Corone 12 Mich. 21 H. 6.

Br. Appeal, pl 68. cites 27 Aff. 25. Fitzh. Corone, pl. 201. cites S. C. & S. P. by Shard.



If the defendant *pleads* that there is a nearer heir, and issue thereupon taken, and found for the defendant, he is discharged of the action, but is not acquitted of the felony within the purview of this statute; so it is if the defendant be discharged by clergy, he is not acquitted within the purview of this statute. 2 Inst. 385.

If the defendant wages battle, and the plaintiff demurs upon it, and it is adjudged against the plaintiff, the defendant is discharged of the appeal, but he is not acquitted until he be acquitted of the fact at the suit of the king. 2 Inst. 385.—2 Hawk. Pl. C. 199. cap. 23. §. 140. says it seems to have been generally agreed, that no acquittal is within the intention of the statute unless it be had on an appeal, either at the suit of the party, or of the king after a nonsuit of the party, and be of such a nature as finally to bar all other prosecutions for the same felony, whether at the suit of the same or any other party, and therefore it seems clear, that no damages shall be recovered on the abatement of an appeal, nor on the bare nonsuit of the appellant, nor where the appellant is barred either by a demurrer, or by a plea, shewing that he is not intitled to the appeal, nor on any acquittal on an insufficient original, because in all these cases the appellee is liable to another prosecution for the same felony.

In appeal,  
it is found  
that the de-  
fendant  
killed a man  
*se defendendo*,  
it shall not

15. So where it is found by verdict that the defendant killed him *se defendendo*, or by misadventure; for this is no acquittal of the felony, because in such case the defendant must purchase a pardon. St. P. C. 169. a. cites Fitzh. Conspiracy 14. 22 Aff. [77.]

be inquired of the abettors, for he did the act; quod nota; contra where is acquitted that he did not do the act; note a diversity; per Hill. J. Br. Appeal, pl. 39. cites 22 Aff. 77.—This shall not be said to be per malitiam, because he had a just cause; for quod quisque ob tutelam corporis sui fecerit, jure id fecisse videtur; & sic de similibus. 2 Inst. 384.

[588] The wife of G. brought an appeal of murder against S. and 5 of his servants as principals, by being present aiding and abetting S. to commit the murder, and S. appeared, against whom the plaintiff declared with a simul cum of his 5 servants, and S. pleaded Not guilty, and process was continued against the other 5. and by verdict it was found that S. killed G. in his own defence, whereupon he was acquitted, and had his pardon of grace; and it was resolved by all the judges of England, that this acquittal of him was, in law, an acquittal of the other 5 that were charged as principals by being present, aiding and abetting, and S. could not upon this statute recover damages for the cause before remembered. 2 Inst. 385. cites a MS. of Dier, Pasch. 15 Eliz. B. R. Copleston v. Stowell.—2 Hawk. Pl. C. 199. cap. 23. §. 140. says, that if a person appealed of murder be found guilty of homicide by misadventure or *se defendendo*, which will be a bar of any other prosecution for the same killing, yet it has been resolved that he shall not recover damages, not only because it appears that the appeal was not groundless, but also because the appellee is not totally acquitted.

16. So where the defendant upon his arraignment betakes himself to his clergy, and the court takes an inquest of office to inquire if he be guilty or not, and they find him Not guilty, yet he shall not recover damages by this acquittal. St. P. C. 169. a. cites Fitzh. Corone 386. Pasch. 17 E. 2. For by taking himself to his clergy he rather confesses the felony by implication than otherwise; but if he waved his clergy, and put himself upon the inquest, and they had acquitted him, it would be otherwise.

S. P. as to  
the king's  
pardon, and  
so if the  
principal  
dies before he  
is attaint, in  
this case  
writ of  
conspiracy

17. So if the defendant has the plaintiff's release, and also the king's pardon, and waves them, and pleads Not guilty, and puts himself on the country, and is acquitted, he shall recover damages, and yet he has done a thing of record whereby he confesses the felony by implication; quære; for it was a pardon by act of parliament, doubtless he could not wave it. St. P. C. 169. b. (A) cites Hill. 11 H. 4. 39.

\* Br. Ap-  
peal, pl. 39.

18. By the words (*in due manner*) it is not a sufficient acquittal if



if it be *erroneously without due process*. St. P. C. 169. b. (A) cites Pasch. \* 9 H. 5. 2. where the defendant came *by exigent* on which the sheriff had *returned Cepi corpus*, whereas he ought to have returned *Exigi feci*, and the defendant appeared on the exigent, and without taking advantage of the process pleaded *Not guilty* to the appeal, and so found, and yet he could not have judgment to recover damages for the reason above; but Staundford says *quære*; for you will find the contrary in Fitzh. Corone 444. Pasch. 19 E. 3. 5. that error in the process is not material if none be in the writ, declaration, or pleading, for the appellee is arraigned upon the original and not upon the mesne process.

cites S. C. accordingly, for the original is good, though the mesne process or return are ill; quod nota. Whensoever any is acquitted by verdict, and yet

his life was never in jeopardy either by reason of the erroneous process or original, or otherwise, though this be within the letter of the law, yet it is out of the meaning, and therefore the defendant in that case shall recover no damages. 2 Inst. 385, 386. — 2 Hawk. Pl. C. 200. cap. 23. s. 141. says, it seems at this day, that if a defendant appearing upon erroneous process to a good appeal be acquitted, he shall recover damages by the intent of the said clause, because such an acquittal is a good bar of any other prosecution for the same felony, and the life of the appellee was put in danger by the appeal. But there were formerly some opinions, that the appellee in such a case should not recover damages, because his life was not in danger at the time of the trial, for that he might have taken advantage of the error in the process; but granting it to be a good rule, that the defendant shall not recover damages where his life is not in danger at the time of the trial, which yet I find not confirmed by any authority, besides the Year-Book of 9 H. 5. 2. it may be answered, that in the case the question the defendant's life is in danger at the time of the trial, because the error in the process is salved by his appearance.

19. By the words (*at the suit of the appellant, or of our lord the king*) this suit of the king is intended upon the appeal, when the defendant is arraigned thereupon, after that the appellant has declared upon his appeal, and is nonsuited; for if the defendant was acquitted at the suit of the \* king, upon an indictment of the same felony, yet he should not recover damages. St. P. C. 169. b. (B)

If the plaintiff in an appeal be nonsuited, and the defendant is arraigned at the suit of

the king and acquitted, he shall recover his damages by this act; for the words are (*vel ad sectam appellantis vel domini regis*;) but this suit of the king must be intended upon the appeal after nonsuit; for an acquittal upon an indictment is not within this statute. For debito modo acquietatus, see 9 H. 5. 2. that the defendant being acquitted by verdict, yet if his life was never in jeopardy either in the original or process, though it be in default of the plaintiff himself, yet is he not debito modo acquietatus within the statute. 2 Inst. 385. — 2 Hawk. Pl. C. 199. cap. 23. s. 140. says it is clear that the appellee is intitled to his damages, where he is acquitted on an appeal at the suit of the king, after a nonsuit of the plaintiff, or where he vanquishes the appellant in a trial by battle.

\* [ 589 ]

20. And the manner how he shall recover damages on acquittal at the king's suit, varies something from his recovery of them when acquitted at the suit of the party; for in the first case he shall not have recovery of them, though he be acquitted, till he sues a *scire facias* against the plaintiff to bring him again into court, he being out of court before by his nonsuit; but in the 2d case he shall have his judgment without suing other process. St. P. C. 169. b. (C) cites Fitzh. damages 77. Hill. 40 E. 3. where the case was, that the appellant took baron after the nonsuit, and yet the *scire facias* awarded against the feme alone.

2 Hawk. Pl. C. 200. S. 143 says that where-ever any person is so far acquitted on an appeal carried on at the suit of the party, as to be intitled to his

damages, he shall have judgment for them without any process to bring in the party to answer to the damages, because he is still in court; but where he is so acquitted on an appeal carried on at the suit of the king after a nonsuit of the party, he shall not recover damages without a *scire facias* to bring in the party, because he was out of court by the nonsuit.

21. By the words (*the justices before whom the appeal shall be heard*) St. P. C. 156. b. (D.)

S. P. accordingly, and cites S. C.—  
If the Defendant in an appeal be tried before justices of *nisi prius*, albeit

*heard and determined, shall punish the appellant &c.*) cannot be understood justices of *nisi prius*; and yet by 14 H. 6. cap. 1. they are empowered to give judgment in treason and felony tried before them, and this as well where the defendant is acquitted as where he is attainted; but yet they are not the justices intended by this statute, inasmuch as the whole plea of the appeal was not heard before them, but parcel only, viz. the trial only. St. P. C. 169. b. (D) 170. a. cites Mich. 10 E. 4. 14.

they have but delegatam potestatem, yet *shall they inquire of the insufficiency of the plaintiff, and of the abettors*; and the words of this act, are *Quod justic' coram quibus auditum fuerit appellum & terminatum*; but that great over ruler experientia hath ruled and over-ruled it by precedents, that they *cannot give judgment for the damages*. 2 Inst 386.

If appeal be commenced before justices of *nisi prius*, there upon nonsuit they may arraign the defendant upon the declaration, and inquire of the damages, and give judgment thereupon and for insufficiency of the pl. intiff may inquire of the abettors. *Quod nota for law, & non negatur*. Br. appeal, pl. 113. cites 22 E. 4. 19. — 2 Hawk. Pl. C. 201. cap. 23. S. 141. (his) S. P. and said to have been held accordingly, and that for the reason given in Staundford; and says that the Stat. 14 H. 6. has been construed to intend only to enable justices of *nisi prius* to give the principal judgment, and not to transfer to them from the court of B. R. a power in collateral matters; yet justices of *nisi prius* have, by usage not now to be disputed, gained a power to assess the damages, and to inquire of the sufficiency of the plaintiff to answer them, and also of the abettors, but says he does not find that they have ever given judgment for the damages; yet there is no doubt but that if such justices be also justices of assize, and as such have an appeal commenced before them, they may as justices of assize, upon the acquittal of the appellee, not only inquire of the damages &c. but also give judgment, both by the letter and meaning of the statute.

2 Hawk. Pl. C. 201. cap. 23. S. (143.) bis, says that if there are several appellees, and all of them acquitted, the damages

22. The statute wills that there shall be consideration of the damages, (*having respect to the imprisonment &c.*) and therefore if the appeal is against several and all are acquitted, the damages shall be taxed severally, viz. against each; for perhaps one has more cause to recover damages than the other; as if one was appealed as principal, and the other as accessory only, that the one is a gentleman, or of other estate, and the other not. St. P. C. 170. a. (A) Hill. 8 H. 5. and Fitzh. damages, Hill. 40 E. 3. 77.

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ought to be severally assessed as to every one of them, and this doubtless both to the letter and meaning of the statute, which provides that in the giving the damages, respect shall be had to the imprisonment and infamy, and other damage sustained of the appeal; and these being several, and receiving different aggravations from the different circumstances of the person's particular case, it cannot but be reasonable that the damages be assessed severally also.

23. But yet this recovery of damages must be intended in one that has ability to recover them; for if appeal be *sued against a monk or feme covert only*, without the sovereign of the house or the baron, as it ought, (unless the sovereign with his monk or the baron with his feme commit felony) the monk or feme shall not recover damages, though they are acquitted. St. P. C. 170. a. (B) cites Fitzh. Corone 276. Hill. 22 E. 3.

Though this branch be general, yet every appellee shall not upon his acquittal

24. But if the appeal be brought *against the baron and feme* together, and they are acquitted, then damages shall be recovered and *taxed severally*, viz. the baron alone shall recover for his imprisonment, and the baron and feme jointly for the imprisonment of the feme. St. P. C. 170. a. (B) cites Fitzh. Judgment \* 108. Pasch. 12 R. 2.

recover damages; for if a *monk* be appealed, or a *feme covert* be appealed alone without her husband, and acquitted, they cannot recover any damages by this act, in respect of their disability.

bility; for the general words of this act does not enable any to recover damages that thereunto was disabled by law. But if an appeal be brought against the *husband and wife*, and they be acquitted damages shall be given to the husband alone for his damage, and to the husband and wife for the damage of the wife. And where *several persons be acquitted*, the damages must be several; for the words of the statute are *habito respectu ad personam*. But then it may be demanded, what remedy hath the monk or feme covert being solely appealed? The answer is, that they have no remedy by this statute, but the abbot and monk, and the husband and wife may have a writ of conspiracy at the common law.

2 Hawk. Pl. C. 202. cap. 23. S. 144. says it has been holden that a monk or feme covert, being appealed without the abbot or husband, cannot have a judgment for the damages on their acquittal, because they are disabled by the law to recover any damages without the abbot or husband; and the general words of a statute shall not be construed to enable persons in a point wherein the common law has disabled them; but the authority of this opinion, as to a wife, is questioned by Hobart; neither do any of those who seem to give it greater weight, bring any other proof of it than a note in Fitzherbert's Abridgments, of a resolution to such purpose in the time of Ed. 3. as to the case of a monk; and an assertion that the law is the same in the case of a wife; against which it may be plausibly argued that since the imprisonment and infamy sustained by a feme covert, in a malicious appeal against her, are far from being less grievous in respect of her coverture, and are a good ground on a writ of conspiracy at the common law brought by the husband and wife; and since the wife may take any thing to the benefit of her husband, and it appears to the court that the appellant by his own act, without any default either in the husband or wife, gives them a good title to the damages; and since no express judgment can be given for the husband, not being a party to the record, and it is most for his advantage as well as his wife's, that a present judgment be given; it may perhaps be thought no unreasonable construction of the statute, that in this particular case judgment should be given for the wife to recover the damages, which as much enure for the benefit of herself and her husband as an express judgment for them both on a writ of conspiracy. However, it is certain that if the husband and wife are both of them appealed and acquitted, they shall have a joint judgment for the damage done to the wife, for which the wife alone shall sue execution if the husband die without suing of it, and the husband alone shall have judgment for the damage done to himself.

\* This is misprinted, it being neither the same year nor the S. P. there; and though the two following pleas are 12 R. 2. yet S. P. is in neither.

25. *Parag. 3. And if peradventure such appellor be not able to recompence the damages, it shall be inquired by whose abetment or malice the appeal was commenced, if the party appealed desire it.*

26. By these words it is implied, that if damages are not to be recovered against the appellant, they never shall inquire of the abettors; and there are several cases where damages shall not be recovered. St. P. C. 170. b. (D)

It is a certain conclusion upon these words of the statute, that

where damages shall not be recovered against the plaintiff, there none shall be recovered against the abettors; also where the plaintiff is sufficient, and so found by the jury, the abettors shall not be inquired of, 2 Inst. 386.

27. And as to the words (*not able to recompence the damages*) [591] they intend *all the damages*; for if the appellant be sufficient to render part, and not all, then it shall be inquired of the abettors, and they shall render them. St. Pl. C. 170. b. (E) cites Pasch. 8 E. 4. 3. and Hill. 8. H. 8. 5. and Fitzh. Corone 219. [41 Aff. 8.]

Appeal by a feme of the death of her husband in

B. R. and after appearances the feme was nonsuited, and it was awarded that she be taken to make fine, and she came by capias and made fine, and after the appellee was acquitted, and it was inquired of the damages, and of the abettors, and found 2 abettors, and damages taxed to 100 l. and the appellor was not sufficient but of 100 s. and it was awarded that the defendant recover the damages taxed to 100 l. against the feme, and that he sue against the abettors if he will; but judgment was not that the feme shall be taken, because she had made fine before. Br. appeal, pl. 74. cites 41 Aff. 8. — Fitzh. Corone. pl. 219. cites S. C. and both Br. and Fitzh. are only translators of the year-book.

A man was acquitted in appeal, and prayed his damages against the plaintiff, and that if he be not sufficient, that it be inquired of the abettors, and it was found that the plaintiff is not sufficient, and that A. and B. are abettors, there judgment shall not be in part against the plaintiff, and in part against abettors, but all against the abettors, if the plaintiff be not sufficient; but in assise the judgment

shall be against all the mesne occupiers, where the disseisor is not sufficient; and the abettors may say that they did not abet after the verdict; for it is only inquest of office against them. But *quære* whether they may say that the plaintiff is sufficient, and it seems that they cannot; for by this they confess that they are abettors. Br. appeal, pl. 96. cites 8 E. 4. 3.

It is resolved that he must recover either all against the plaintiff, or all against the abettors, and not by parcels; so as if the plaintiff be not sufficient for the whole, the defendant shall recover the whole against the abettors; for *prædicta damna & omnia damna* are all one. 2 Inst. 386.——2. Hawk. Pl. C. 202. Cap. 23. S. 145. says it has been holden that the abettors are in no case liable to render damages where the appellant himself is not liable, though never so sufficient; and this is confirmed by experience, and the manifest purport of the statute, which by directing that the abettors be inquired of, where the appellant appears insufficient to answer the damages, plainly intimates that they are to be inquired of in such cases only wherein the appellant must have answered them, if he had been able; and agreeably hereto it seems to be settled, that a release of damages to the appellant will discharge the abettors if they can produce it.

\* Br. appeal pl. 77. cites 41 Aff. 24. and the case was, viz. appeal of the death of the baron by a feme, against one as principal, and others as of force and aid, and the plaintiff was nonsuited after appearance, and after the principal was acquitted at the suit of the King, and it was inquired of damages and abettors by the same inquest, which found

28. The statute is, that they shall inquire of the abettors (*if the party appealed desires it*) so that it seems the court *ex officio* ought not to inquire, unless at the defendant's desire; but if they have inquired thereof *at the desire of one of the defendants*, and they found that there were no abettors, and afterwards the other defendant being acquitted, prays an inquiry of the abettors, yet it shall not be inquired because it appeared to the court by the verdict of the other inquest that there were none, and therefore in such case nothing more now shall be inquired unless damages, as appears Fitzh. Corone 222. \* 48. Aff. [but there it is 41 Aff. 24. But Staundford says *quære*: for he says this award seems not law, because it is against the express words of the said statute, and against reason, that the verdict of an inquest should bind me who am not privy to it, and against which I have no remedy, it being only an inquest of office; for though it is commonly inquired of abettors by the same jury that acquits the defendants, yet their inquiry therein is of office only; for if they find abettors, the abettors, when they come, may traverse all that they have found; as if they find the appellant not sufficient, or that such and such were abettors, those that are supposed abettors may say by protestation, not confessing the felony, *pro placito* that the appellant is sufficient, or that they did not abet. St. P. C. 17c. b. (F) 171. 2. (A) cites † 8 E. 4. 3. For the words of the statute are, "If he be lawfully convicted of such a malicious abetment;" which proves also that he shall have answer to what was found by the inquiry.

damages, but no abettors; and after the accessories came and were arraigned and acquitted, and prayed that it be inquired by the same inquest of the damages and abettors and it was denied of the court, because at another time it was found that there were no abettors; per Ingleby. But they inquired of the damages, and severally what damages each person by himself sustained. *Quod nota.*

2 Hawk. Pl. C. 203. cap. 23. S. 147. S. P. and cites S. C. but says that this case, if thoroughly examined, seems repugnant to itself; for the jury were permitted on the 2d acquittal to tax the damages, which yet are said to have been taxed before; but to what purpose should this be done, unless it were first found that the appellant was sufficient, or else that there were abettors, which could not but controul the first finding? as also the 2d taxation of the damages must do, unless it were wholly the same with the first.

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† Br. Appeal, pl. 96. cites S. C. accordingly.

This insufficiency of the plaintiff in the appeal must be found by the jury, and cannot come in by the averment of the party, and so it is in other like cases. 2 Inst. 386.——2 Hawk. pl. C. 202. cap. 23. S. 146. says it has been holden, that unless the appellant be found by the jury to be insufficient, the abettors shall not be inquired of; and yet the statute doth not expressly direct that the jury shall inquire of the sufficiency of the appellant. But it being the general method of the law in other cases of the like nature, to make an inquiry by a jury, it is certainly a reasonable construction of the general words of the statute that such inquiry may be made in the present case.

Yet



Yet whether the justices themselves may not, if they think fit, make such inquiry without a jury, it being but an inquiry of office, may deserve to be considered for the reasons in 52 & 142. Sect. of this chapter. However, there can be no doubt but that the insufficiency of the appellant must appear by one or the other of these inquiries, before the abettors can be inquired of.

*This writ is given in lieu of the writ of conspiracy at the common law, the abettors, coming in upon this process, may traverse the abetment, because they were estrangers to the verdict; and if the defendant, that sued forth the distress, be nonsuit, yet may he have a new writ, and it is not peremptory to him.* 2 Inst. 386.

The abettors may traverse the jury's finding the appellant to be insufficient, or that they abetted &c. For it is hard that a man should be concluded by any matter whatsoever, found to his prejudice in an action, to which he is no way privy. 2 Hawk. Pl. C. 203. cap. 23. S. 147.

29. And note that it is a good answer for the abettor to shew *Albeit the matter which proves that the defendant ought not to have his damages against the appellant, or that the defendant was not lawfully acquitted but erroneously, as appears in Fitzh. Corone 386. Pasch. 17. E. 2.* But if the abettors will take exception to the inquisition found, for that it is not found at what day, year, or place the abetment was made, such exception shall not be good; for by finding the abetment they have satisfied the statute, which is, "that it be inquired by whose abetment," and this they have found; wherefore as to the year, day, and place the defendant in the appeal ought to adjust it to the inquisition, and so supply what is wanting. St. P. C. 171. a. (A) cites Fitzh. Corone 45. Mich. 22 E. 4.

*Albeit the jury find neither the time nor the place where the abetment was, yet if they find the abettors it is sufficient; for when the plaintiff appears, the defendant*

may shew time and place in good time. 2 Inst. 386. — 2 Hawk. Pl. C. 203. cap. 23. S. 152. S. P. and that by such shewing he supplies the omission of the jury in not finding any time or place on their inquiry of the abetment &c.

30. In appeal where the defendant is acquitted, it shall be inquired of the damages severally, as to the damage every person by himself sustained by the appeal. Quod nota. Br. damages, pl. 114. cites 41. Aff. 24.

*Br. appeal, pl. 77. cites S. C. & S. P. admitted. — Fitzh. Corone, pl.*

222. cites S. C. & S. P. accordingly.

31. Parag. 4. And if it be found by the inquest that any man is abettor through malice, at the suit of the party appealed, he shall be distrained by a judicial writ to come before the justices.

*Abettors were found (upon the acquittal of*

the defendant) by name, et quod procuraverunt, instigaverunt & abettaverunt predictum querentem ad capiendum & prosequendum appellum predictum in forma predicta, and said not (per malitiam,) and yet allowed of. But nota, the surer way is to pursue the words (falso & per malitiam,) according to this act. 2 Inst. 336.

32. By these words the process against them seems to be a distress in infinitum; and yet in Fitzh. Corone 102. Hill. 46 E. 3. the court awarded first a ven. fac. and afterwards a distress; but Staundford says that this is contrary to all other books which he had read; for they all mention a distress for the first process, and this process is always pursued by the person acquitted, who for his speed may pursue it, though the appellant is not in court; as where the appellant was nonsuited in appeal, and the defendant arraigned at the suit of the king and acquitted, and his damages taxed, and the abettors found, here the defendant shall have process against the abettors immediately, though the judgment of \* damages shall be suspended till scire facias be sued out and returned against the appellant. St. P. C. 171. a. (B) b. cites Fitzh. damages 77. Hill. 40 E. 3.

\* [ 593 ]  
2 Inst. 387. cites S. C. but says seems that the process given by the statute is distress infinite — 2 Hawk. Pl. C. 203. cap. 23. S. 151. says it has been holden that if the appellee

choose rather to proceed for the recovery of his damages by judicial process than by original, it is

is safest for him to make use of a distress, which is given by the express words of this statute, yet there is a note of an old case wherein a venire facias was first awarded; but it is questionable whether this be justified by the statute or not.

2 Hawk.  
Pl. C. 203.  
S. 153. says  
it has been  
holden that  
whether

33. Note that the *defendant* who is acquitted in the appeal *may be nonsuited in the process against the abettors, and commence de novo* if he will; for this nonsuit is not peremptory to him. St. P. C. 171. b. (C) cites Fitzh. Corone 386. 17 E. 2.

the nonsuit be in the original writ or process by the appellee against the abettors, and whether before or after appearance it is no bar of a 2d, or after process.

2 Inst. 387.  
S. P. —

2 Hawk.  
Pl. C. 203.  
cap. 23. S.  
150. says it  
has been  
holden that  
though the  
statute ex-

34. An original writ was brought for abetment, and counted against the abettors of greater damages than were assessed in the appeal, and allowed for good; for of those damages taxed in the appeal an attain lies not, because the inquiry as to them is only of office, and the defendant in appeal cannot compel the justices to increase them, and so it is reasonable that he aid himself by such action. St. P. C. 171. b. (D)

pressly gives only judicial process for the recovery of the damages against the abettors, yet the appellee may, if he think fit, take an original writ of abetment grounded on the statute, and therein count to greater damages than were found by the jury; which, in respect of such finding, being but in nature of an inquest of office, shall not conclude the appellee.

35. And note that such remedy as is given by this statute to the defendant in appeal of felony, if he be acquitted, is likewise given to him who is *falsely indicted for prosecuting in court christian matter belonging to the temporal jurisdiction*, after his acquittal thereof. St. P. C. 171. b. (E) and says this remedy is given by Stat. 1 R. 2. cap. 13.

If the jury  
give too  
small da-  
mages, it is

36. In appeal the defendant was acquitted, and damages taxed for him. These damages shall not be *increased* contrary to the taxation of the jury. Br. Appeal, pl. 136. cites 42 Aff. 19.

but an inquest of office, and the plaintiff may have an original writ of abetment, and inquire of greater damages. 2 Inst. 387. — 2 Hawk. Pl. C. 201. cap. 23. S. (142) bis, says if a jury gives too small damages to the appellee, the court may increase them; from which it seems to follow, that if a jury give too large damages the court may abridge them. And surely no less can be implied by the statute's ordering that the damages shall be given according to the discretion of the justices, respect being had to the imprisonment &c. and this construction also seems agreeable to the rules of law in other cases, by which the court is said to have a general discretionary power, except in some special cases, as local trespasses &c. either to increase or abridge the damages found by an inquest of office; and where a jury which hath acquitted an appellee inquires afterwards of the damages, it seems in respect of such inquiry to be no more than an inquest of office, though it were returned to try the cause.

### (E. a) Execution. How anciently.

\* [ 594 ]

This should  
be 11 H. 4.  
12. a.—Pl.  
C. 306. b.  
Bromley

1. THE ancient law was, that when a man had judgment to be hanged in an appeal of death, the *wife and all the blood* of the party slain should *draw the defendant to execution*. 3. Inst. 131. cites \* 11 H. 4. 11. and that Gascoigne said then, that so it was in his days.

cites S. C. & S. P. by Trewit and Gascoigne; and says that all of the blood of the person murdered drew the felon by a long cord to the execution, and that this usage was founded upon the law



loss which all of the blood had by the murder of one of themselves, and for their revenge, and the love which they had to the person killed.

For more of Appeal in general, see *Accessory, Addition, Murder, Rape, Treason, Willows*, and other proper titles.

## Appendant [or Appurtenant.]

### (A) What Thing may be Appendant [to what.]

[1. **A**N *advowson* of a priory may be appendant to a castle. \* 18 Ed. 3. 15. b.]

moor for his beasts levant or couchant upon his manor; or if he grants to another common of estovers or turbary in fee-simple, to be burnt or spent within his manor, by these grants the commons are appurtenant to the manor, and shall pass by the grant thereof. Co. Litt. 121. b.—Vent. 407. S. P. by Hale Ch. J. \* Fitzh. Quare impedit, pl. 151. cites S. C.

[2. An *advowson* which is said to be *appendant to a manor*, is, in rei veritate, *appendant to the demesnes* of the manor which is of perpetual subsistence and continuance, and *not to the rents or services*, which are subject to extinguishment or destruction. Co. Litt. 122.]

*Appendants are ever by prescription, but appurtenances may be created at this day; as if a man at this day grants to a man and his heirs common in such a*

*Advowson is appendant to the principal part of the manor viz. to the*

*demesnes*, and cannot be appendant to the services; per Dyer. 2 Le. 222. pl. 281. Pasch. 16 Eliz. C. B. in case of Bawell v. Lucas.—S. P. accordingly, and the reason is, that a man cannot prescribe in profit appendant to a thing that is not the principal thing, and which is of perpetual continuance Savil. 105. pl. 182. Trin. 30 Eliz. in case of Long v. Heming.—4 Le. 216. in pl. 349. S. P. Arg.—D. 70. pl. 41. S. P. admitted accordingly.—Yet if one grant all the demesnes of the manor *cum pertinentiis*, it seems the advowson shall not pass with the demesnes but remains in gross, because the manor is extinct by this separation, and the advowson shall not pass unless expressly named, and then there ought to be a deed to carry it. But quare. Savil 104. in case of Long v. Bishop of Gloucester and Hemings.—An advowson is properly appendant to the demesnes, and not to the services; per Cur. Cro. E. 210. pl. 6. Mich. 32 & 33 Eliz. B. R. in case of Long v. Hemings.

In law the advowson is appendant to all the manor, but most properly to the demesnes, out of which at the commencement it was derived; per tot cur. Le. 208. pl. 139. Mich. 32 & 33 Eliz. C. B. in S. C.

[3. If an *advowson* be *appendant to the manor of D. of which manor the manor of S. is held*, and after the manor of S. is made parcel of the manor of D. by way of escheat, the advowson is only appendant to the manor of D. Co Litt. 122.]

4. Affise of bread and beer, pillory, and tumbrell, are appendant to the view of frank-pledge where a man has it by grant of the king, and if he does not use pillory, and tumbrell, he shall lose his franchise. Br. quo warranto, pl. 8. cites It. Canc. 6 E. 2.

X x 4

5. A

5. A *forest* may be appendant to an honour, as to the honour of Pickering, of which the king was seised. Jenk. 29. pl. 55. cites 26. Aff. 9.

Mo. 297. pl. 443. S. P. in the case of the Queen v. Vaughan, Marcella. 6. *Bona & catalla filonum* cannot by any usage or length of time be appendant or appurtenant to a manor; per tot. cur. 9 Rep. 27. b. Mich. 33 & 34 Eliz. in case of the Abbot of Strata and seems to be S. C. — Cro. E. 293. pl. 7. Hill. 35 Eliz. B. R. S. P. admitted.

7. Common appendant belongs to arable land, not to pasture land. Brownl. 35.

(B) What Things shall be said appendant, and to what Things, and what not.

The greater part of the cases under this letter are to the same point as those under the letter (A) and therefore might better have been placed under that head.

Br. Incidents, &c. pl. 2. cites S. C. and that Littleton and

[ 1. 33 H. 6. 4. b. By 2 serjeants, when *advowson* or other things which may be appurtenant time out of mind, &c. passed with the manor, by these words *cum pertinentiis*, this makes the appendancy.]

Wangford laid it down for law, that hundred or leet may be appendant to a manor well enough, and that if it has been used to pass by feoffment of the manor *cum pertinentiis*, &c. time out of mind, it is appendant; quod nota, quia nemo negavit.

\* 4 Rep. 36.

b. 37. a. Mich. 26 & 27 Eliz.

B. R. Tyringham's case.

† Co. Litt.

121. b. S. P.

for the thing ap-

pendant or appurtenant must agree in nature and quality with the thing to which it is appendant or appurtenant. — Pl. C. 168. a. b. Hill v. Grange.

[ 2. One thing *incorporeal* cannot be appendant to another thing *incorporeal*. Com. 170. Bracton lib. 2. fol. 53. \* Co. 4. Tir. 36. b. † Lit. 121. b.]

[ 3. [Nor] One *corporeal* thing cannot be appendant to another *corporeal* thing. Com. 170. Co. 4. Tir. 36. b. Co. Litt. 121. b.]

[ 4. But a thing *incorporeal* may be appendant to a thing *corporeal*. Com. 170. Bracton lib. 2. fol. 53. Co. Litt. 121. b.]

\* Br. Incidents, pl. 2. cites S. C.

[ 5. A leet may be appendant to a manor. \* 33 H. 6. 46. per Lit. 13 H. 4. 9. b.]

A man may prescribe in a leet appendant to his manor or appendant to his house, but not to a church or a chapel. Br. Incidents, pl. 29. cites Fitzh. tit. Leet. — Co. Litt. 121. b. S. P. for the one is temporal and the other ecclesiastical.

A leet may be appendant to a hundred. Br. Incidents, pl. 18. cites 12 H. 7. 16. — Mo. 426. pl. 595. Hill. 30 Eliz. B. R. the S. P. admitted, Norris v. Barret. — S. P. by Jones J. and admitted per cur. Mar. 75. pl. 115. Mich. 15 Car.

\* Br. Incidents, &c. pl. 2. cites S. C.

[ 6. A hundred may be appendant to a manor or appurtenant. \* 33 H. 6. 4. b. per Lit. Contra † 13 H. 4. 9. b.]

† Br. Jointenants, pl. 2. cites S. C. & S. P. admitted. — Fitzh. Release, pl. 9. cites S. C.

It was admitted, that a *hundred* may be parcel of a *manor*, and it seems that it may be appendant. Br. Court Baron, pl. 15. cites 27 H. 6. 2.

[ 7. A *rent-charge* may be appendant to a *manor*. 1 H. 4. 3.]

\* [ 8. *Land* may be appurtenant to an *office*, as to the office of foreship and warden of the Fleet, &c. because those which have had the office have had the land. 1 H. 7. 16. Com. 169. D. 6 E. 6. 71. 43.]

Land cannot be appurtenant to an office without a prescription,

and it shall not be understood that land belongs to an office, unless it be specially shewn by pleading the prescription. Jenk. 170. pl. 33.

Land is appertaining to the office of the Fleet and the Rolls, but that is to the office which is in another nature than the land is. Godb. 352. pl. 447. per Doderidge J.

*Land*, or any other annual profit real, may be incident and appendant to an *office*, and by grant of the office the land shall pass, as to the office of warden of the Fleet, &c. But then the offices are offices of inheritance. D. 71. a. pl. 43. Trin. 6 E. 6. in the case of Withers v. Isham. — As to offices in fee whereto lands may appertain, they are of perpetual subsistence either being in Esse, or in that they are grantable over. Co. Litt. 122. 2.

[ 9. One office may be appurtenant to another, as the *custos brevium* gives one of the *prothonotaries de banco*, Com. 169. and so of the chief justice de banco.]

The office of exigenter is in the gift of the chief

justice de banco. See D. 175. a. pl. 25. Mich. 1 & 2 Eliz. Scroggs v. Colehill.

[ 10. But *land* cannot be appendant to *land*, because both are things corporeal. Com. 169, 170. per curiam.]

Meadow cannot be appurtenant

to *land* nor to a *house*. Br. Incidents, pl. 16. cites 3 E. 2. in Fitzh. tit. Brev. 783.

Meadow cannot be appurtenant to *land*. Thel. Dig. 70. lib. 8. cap. 21. s. 3. cites Mich. 3 E. 2. Brief 783. but that contra it is said 3 E. 3. It. North. Barre 298. by Scroope. — Pl. C. 170. b. S. P. accordingly. Mich. 4 Mar. 1. in case of Hill v. Grange.

But meadow may be appurtenant to an *oxgangs* of land. Thel. Dig. 70. lib. 8. cap. 21. s. 3. cites 2 E. 3. 57.

[ 11. An *advowson* in one county may be appendant to a *manor* in another county. 33 H. 6. 4. b. per Lit.]

An *advowson* in Middlesex may

be appendant to a *manor* in Cornwall. Br. pl. 31. cites Fitzh. tit. Quare Imp. 100. M. 34 E. 3.

[ 12. A *vicarage* may be appendant to a *parsonage*. Dubitatur. 17 Ed. 3. 76.]

Fol. 231.

[ 13. If a parson appropriate creates a vicarage, &c. lawfully, the *vicarage* of common right shall be appendant to the *parsonage*. Contra 17 Ed. 3. 51.]

D. 350. b. pl. 11. Pasch. 18

Eliz. S. P. admitted. — Bendl. 252. pl. 270. S. C. and the pleadings, Blagrove v. Pierce. — S. C. cited, and S. P. admitted, 10 Rep. 65. b. — Ld. Raym. Rep. 200. Pasch. 9 W. 3. in case of Reynoldson v. Blake. Treby Ch. J. cited the case of 17 E. 3. 51. and said, that heretofore it was doubted, whether the *advowson* was appendant to the rectory, and that it was long before a vicar obtained the repute of a corporation, but it is now settled that it may be appendant to the rectory.

[ 14. [So] a vicarage may be appendant to a *manor*, though of common right it belongs to the *parsonage*, for it might be granted over by the parson *time out of mind*, and so become appendant to the *manor*, or it might be by composition. My Reports, Mich. 13. the King and Sacker. Mich. 14 Jac. B. adjudged. The Dean and Chapter of Exeter and Cornish's case.]

Though the *advowson* of the vicarage usually appertains to the *parsonage*, yet it is not of necessity,

but it may be appertaining to a *manor*. Cro. J. 386. pl. 16. the King v. Bishop of N. and Saker. — Roll. Rep. 237. in pl. 7. S. C. Coke Ch. J. said, that a vicarage may be appendant to a *manor*, and that he had seen one so, though 5 R. 2. Quare Impedit [Fitzh. pl. 165.] is adjudged contra. — S. P. accordingly; as if the rectory was before the appropriation appendant to the *manor*, the *advowson* of the vicarage upon the appropriation may well be reserved to the patron, and it shall be appendant in the same manner as the rectory was; and though the deed of the appropriation

appropriation be not extant, yet the usage in the presentation time out of mind is sufficient evidence of the appendancy. Mo. 894. pl. 1258. Mich. 16 Jac. C. B. Sherley v. Underhill.

\* [15. One *advowson* cannot be appendant to another *advowson*. Contra 24 Ed. 3. Quare Impedit 13. per Curiam.]

[16. *Land* may be appurtenant or parcel of a hundred, for a man may convey his manor except a small parcel of land, which in continuance may be reputed parcel of the hundred. Mich. 17 Jac. B. said by Hobart to be resolved in Camera Scaccarii.]

[17. An *advowson* may be appendant to a tenement. 32 Edw. 1. 89. admitted.]

[18. An *advowson* may be appendant to one acre. 18 Ed. 3. 52. 39 Ed. 3. 36. b. 19 Ed. 3. Quare Impedit 155 D. 28 H. 8. 24. 153. to 6 acres.]

\* Fitzh. Darrein Presentment, pl. 9. cites S. C. —S. P. by

[19. If an *advowson* be appendant to a manor, and one acre is granted with the *advowson*, it is clear that after the grantee has presented, the *advowson* is appendant to this acre. 44 Ed. 3. 16. admit. \* 17 Ed. 3. 3. b. 5. adjudged. 18 b. 21. b.]

Windham J. Arg. cites 43 E. 3. 12. but takes no notice of the grantee's having presented. Cro. E. 39. Pasch. 27 Eliz. C. B. in pl. 1.

\* Fitzh. Darrein Presentment, pl. 9. cites S. C.

[20. So it seems it is appendant before any presentation. Dubitatur 43 Ed. 3. 25. B. \* 17 E. 3. 3. 5. 18 b. 24. b. they did not rely upon the presentation.]

Fitzh. Darrein Presentment, pl. 9. cites S. C.

[21. But this feoffment of the acre with the *advowson* ought to be by deed to make the *advowson* appendant. 17 Ed. 3. 4. b. 18 b.]

\* Fitzh. Darrein Presentment, pl. 9. cites S. C.

[22. If a baron is seised in the right of his feme of a manor, to which the *advowson* is appendant, and grants one acre with the *advowson*, the *advowson* shall be appendant to this acre. \* 17 E. 3. 5. 18. b. adjudged 21. b. though the husband had not the absolute right, but † 23 Aff. 8. this is reversed in a writ of error.]

† Br. Error, pl. 131. cites S. C.

See tit. Presentation (B. d. 22.) pl. 1. S. C.

[23. So if the husband hath aliened all the manor by acres to several persons saving one acre, the *advowson* shall be appendant to this. 17 Ed. 3. 22. b.]

[24. If lessee for life of a manor, to which an *advowson* is appendant, aliens one acre with the *advowson* appendant, the *advowson* is appendant to the acre for this. 18 Ed. 3. 44. Curia.]

S. P. accordingly, Arg. Het. 14. in case of Hartup, and Tuck v.

[25. If coparceners of a manor to which an *advowson* is appendant, make partition of the manor and not of the *advowson*, the *advowson* continues appendant to the manor. 17 Ed. 3. 39. Curia.]

Dalby. —S. P. by Powell J. the *advowson* at each turn continues appendant; but if they make express mention of the *advowson* upon the partition it becomes in gross; but if the one dies without issue, so that the demesnes descend to her that has the services, or vice versa, the manor is revived, and the *advowson* becomes appendant again because it was by act in law, so that the diversity is where the severance is by act in law, and where by act of the party. Ld. Raym. Rep. 198. Pasch. 9 W. 3. C. B. in case of Reynoldson v. Blake.

\* If an express exception be made of the *advowson*, then the *advowson* remains in coparcenary and in gross, and so the books are reconciled. Co. Litt. 122. 2.

So it is if they make composition to present against common right, yet it remains appendant. Co. Litt. 122. 2.

[26. If

[ 26. If the *baron*, *seised in right of the feme* of a manor to which an advowson is appendant, *aliens one acre with the advowson appendant*, and after *aliens the residue of the manor to another*, and dies, if the *wife recovers in a cui in vita* the acre with the appurtenances, she shall recover the advowson as appendant. 17 Ed. 3. 22. b. 19. b.]

[ 27. If a *feme* be *endowed of the third part of a manor with the appurtenances*, the 3d part of the advowson shall be appendant to it also. 6 Ed. 3. 44. Quare Impedit 40.]

[ 598 ]

Fitzh. Dar-  
rien Pre-

sentment, pl. 9. cites S. C.

[ 28. If the *feme* be *endowed of the 3d part of a manor, with the advowson appendant*, and after another *baron and feme purchase all the manor and present twice*, and after *aliens one acre with the advowson appendant*, the 3d part of the advowson does not pass as appendant to the acre, because the baron had but a reversion in this 3d part at the time of the grant. 23 Ass. 8. adjudged.]

Fol. 232.

Br. Error,  
pl. 121. cites  
S. C. —

Br. Presen-

tation, pl. 38. cites S. C. — See Tit. Presentation, (B. d. 22) pl. 1. S. C.

[ 29. If a man *seised of a manor to which an advowson is appendant*, *grants the 3d part of the manor with the appurtenances, without making mention of the advowson*, nothing of the advowson passes. 6 Ed. 3. 44. per Parn. and Stoner. Title Quare Impedit, 40.]

This does  
not properly  
belong to  
this divisi-  
on.

30. A man may prescribe that he and all those whose estate, &c. in the *manor* of D. have had there a *park* time out of mind, and is appendant, &c. and is good, &c. Br. Incidents, pl. 39. cites Itin. Not. 3 E. 3.

Br. Action  
sur le Sta-  
tute, pl. 48.  
cites Itin.  
Not. tem-  
pore E. 2.

31. *Treasure trove* cannot be appendant to a *leet*, nor can it pass by the word (*leet*.) Br. incidents, pl. 38. cites Itin. Cant. 6 E. 3.

32. An *advowson in possession* cannot be appendant to the *reversion of a manor expectant on an estate for life*; but otherwise it is of an *estate for years*. 5 Rep. 11. b. Mich. 39 & 40 Eliz. C. B. in *Ive's case*, per cur. cites 38 H. 6. 33. b.

Hob. 161.  
S. C. cited  
by Hobart  
Ch. J. as the  
abbess of  
Sion's case.

33. A *pischary* may be appendant to a *house and land*. Br. Incidents, pl. 19. cites 4 E. 4. 29.

Common of  
*pischary* may  
be appen-

dant to a *house and 8 acres of land*, viz. to fish from such a place to such a place. Br. Trespass, pl. 306. cites 4 E. 4. 29. — Br. Prescription, pl. 66. cites S. C.

34. Note that where *four manors* with advowson appendant to one of them *descend to four daughters, who make partition of all except the advowson*, and every one has a manor, and the advowson remains to them in common, this is a severance of the advowson in the law, and it is not now appendant for any part; but if three of the daughters die without issue, and the fourth is their heir, now the advowson is appendant as before. Br. Incidents, pl. 14. cites 2 H. 7. 4.

35. A man may make *deed of gift of advowson or villein regardant*, so be appendant or regardant to what parcel of the land he will; as  
where

where two manors are given in tail by one deed, the donee may discover [discontinue] the one manor, and give the deed with it; per Keble; but Fairfax and Hufley contra. But a man may give part of the manor to which, &c. with the advowson or villein to J. S. and those make it appendant to those parcels. Br. Incidents, pl. 15. cites 4 H. 7. 10.

Dr. Incidents &c. pl. 16. cites Fitzh. Brief,

36. *Waif and estray* is not parcel of a leet, nor incident to it, but it may be appendant to a leet, note a diversity. Br. Estray. pl. 15. cites 8 H. 7. 1.

783. 3 E. 2. S. P. accordingly. — Mo. 297. pl. 443. Pasch. 32 Eliz. B. R. the S. P. admitted in case of the queen v. Vaughan. — 9 Rep. 27. Mich. 33 & 34 Eliz. S. P. accordingly, in the case of the abbot of Strata Marcella.

Pl. C. 170. b. S. C. and all the justices (except Browne) agreed that the term (pertaining to the messuage) shall be taken in the effect and sense of usually occupied with the messuage, or lying to the messuage. — S. C. cited. And. 77.

37. A lease was made of a messuage in D. with all lands to the said messuage belonging Habend', &c. It seemed to Stamford J. that lands might be pertaining to a messuage but not parcel; but Saunders, Brown, \* and Ld. Brooke, e contra, in as much as they are of one and the same nature; but yet by the words above, the lands pass by the intention of the parties and the open confuance of the use and occupation of the land and house together. D. 130. b. pl. 69. 70. Pasch. 2 & 3 P. & M. Hill v. Grange.

the effect and sense of usually occupied with the messuage, or lying to the messuage. — S. C. cited. And. 77.

\* [599]

38. Things compounded may have divers things appurtenant to them, or to be parcel of them, as manor may contain land, meadows, pasture, wood, and rent, &c. and all the things are contained in the gross name. Arg. Pl. C. 168. b. Hill. 3 P. & M. Hill v. Grange.

Common of turbarry or Estovers

39. Estovers may well enough pertain to a house. Pl. C. 170 b. Mich. 4 Mar. 1. in case of Hill v. Grange.

cannot be appendant or appurtenant to land, but to an house to be spent there; for there must be an agreement in nature and quality. Co. Litt. 121. b.

40. A seat in a church cannot be claimed by prescription as appendant to land but to an house; for the seat belongs to the house in respect of the inhabitancy; and therefore if the house be part of the manor he may claim the seat as appendant to the house. Co. Litt. 121. b. 122. a.

41. Nothing can be properly appendant or appurtenant to any thing, unless the principal and superior thing be of perpetual subsistence and continuance, as advowson that is said appendant to a manor is in rei veritate appendant to the demesnes of the manor, which are of perpetual subsistence and continuance, and not to rents or services which are subject to extinguishment and destruction. Co. Litt. 122. b.

Le. 34. pl. 42 Higham v. Harewood. S. C. the words of the will being, viz.

42. Land shall pass as pertaining to a house if it has been occupied with it by the space of \* 10 or 12 years, for by that time it has gained the name of parcel, or belonging, and shall pass with the house by that name in a will or lease, &c. Per Anderson Ch. J. Cro. E. 16. pl. 7. Pasch. 25. Eliz. in case of Higham v. Baker.

I will that my house with all the appurtenances be sold by my executors. It was resolved by Wray, Clench, and Gawdy, that by a sale by the executors the lands do pass; for by Wray, these words



words (with all the appurtenances) are emphatical words to inforce the devise, and that does extend to all the lands, especially it being found that the testator gave the scrivener his instructions accordingly.

\* In 2 years land may in reputation be appurtenant to a house, if by usage thereof with the house the profits thereof are spent in hospitality; and a small time will suffice if there are circumstances which inforce the reputation; per Lea Ch. J. and not denied; and this notwithstanding 6 Rep. 64. was cited that 5 or 6 years are not sufficient. But the court inclined that no certain time can be defined; for the circumstances make the vulgar reputation of appurtenancy. But Ley Ch. J. held that if one be seised of a house to which lands are appurtenant, and the house and lands are severed by alienation, this appurtenancy which was gained by use is lost by severance. Palm. 376. Trin. 21 Jac. B. R. in case of Loftes v. Barker.——2 Roll Rep. 347. S. C. & S. P. by Ley Ch. J.

43. In ejectment a devise was of a house with the appurtenances; the devisee claimed land in the field. Popham doubted whether it should pass, but Fenner held that it might well pass, and that upon a demurrer in 28 Eliz. it was held accordingly. But afterwards the defendant to make it clear that the land did not pass, shewed that the house was copyhold and the land freehold; whereupon the whole court conceived that it could not be said appurtenant, though it had been enjoyed with it; and the plaintiff had been nonsuited. Cro. E. 704. pl. 24. Mich. 41 & 42 Eliz. Yate v. Clincard.

44. Tithes cannot be appendant to a manor. Arg. Sty. 279. cites Cro. E. 293. pl. 7. Sherwood v. 42 Eliz. Sherwood v. Winston.

Winchcomb, Hill. 35 Eliz. B. R. held per tot. cur. that one cannot prescribe for tithes as parcel of a manor.

Tithes cannot be appurtenant to, but are parcel of, the rectory. Arg. and seems to be admitted. Mo: 223. pl. 362. Hill. 28 Eliz. B. R. in Carew's case.——By Manwood Ch. B. Tithes are parcel of the rectory. Le. 282. pl. 380. S. C.—— See Grants (A. a. 2) pl. 10. Bone v the bishop of Norwich.

[ 600 ]

45. A way cannot be appendant or appurtenant to a house; for it is an easement only and not an interest. Yelv. 159. Trin. 7 Jac. B. R. Godley v. Frith. A way may well enough pertain to a messuage

Pl. C. 170. b. Mich. 4 Mar. 1. in case of Hill v. Grange.

46. In strictness of law land cannot be said to be appurtenant to house or land, but in vulgar reputation it may be said belonging, and in such case, in case of grant the land will not pass as appertaining to land; per Ley Ch. J. and cites 4 Rep. Tyrringham's case. But in case of a will (it seems) it may. Godb. 353. pl. 447. Trin. 21 Jac. Knight's case. 2 Roll Rep. 347. Lofts v. Baker, S. C. and Haughton J. held that Lands will pass by the

name of the house, if they have been usually enjoyed and occupied with a house, so that they have thereby gained the reputation of being appurtenant. [But it seems that this is meant of a devise in such manner according to the principal case.]

Land cannot be appertaining to a house. Pl. C. 85. b. in case of Straunge v. Croker. And 168. in case of Hill v. Grange, and ibid. 170. b. 2 Show. 438. pl. 402. S. P. Arg. and cites the case of Hill. v. Grange.

Land may be said to be appertaining to an house as well in the king's case, as in the case of a common person, when they have been let and possessed together by a convenient time. Cro. C. 168. pl. 15. Mich. 5 Car. B. R. in case of Jennings v. Lake.

47. A. had an house and kiln to dry oats built upon several parts, of a close, and also 2 mills to make oat-meal, adjoining to the said close, which were used with the house for several years, but were lately divided, then he sold the house with the appurtenances and part of the close to one, and sold the mills with the appurtenances to another; and adjudged that the kiln did not pass; for by the grant of the house with the appurtenances, nothing passed but what properly belonged to But per Windham J. if all the matter had been found, and that the kiln was necessary for the use of the

*mills with-* to the house, as by *cum terris pertinentibus* it might. Lev. 131.  
*out which they* Pasch. 16 Car. 2. B. R. Archer v. Bennet.  
*[the mills]*

*were not useful*, the kiln had passed as part of the mills though not as appurtenances; as by grant of a messuage the conduits and water-pipes pass as parcel though they are remote, to which no answer was given. Lev. 131. in case of Archer v. Bennet.——Sid. 211. pl. 9. S. C. adjudged that the kiln did not pass; for if it should pass, it would pass by the grant of the mill with the appurtenances, and it does not appear that it is appurtenant to the mill, but e contra, for it might be a lime kiln which has no relation to the mill, but if it had been found to be a malt kiln, then it seemed to some of the justices that it would pass; because a malt kiln may be appurtenant to the mill for preparing malt for the mill.

THE END OF THE SECOND VOLUME.





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